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INTERNATIONAL FOUNDATION FOR ART RESEARCH

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Is There a "Duty" to Authenticate Art?

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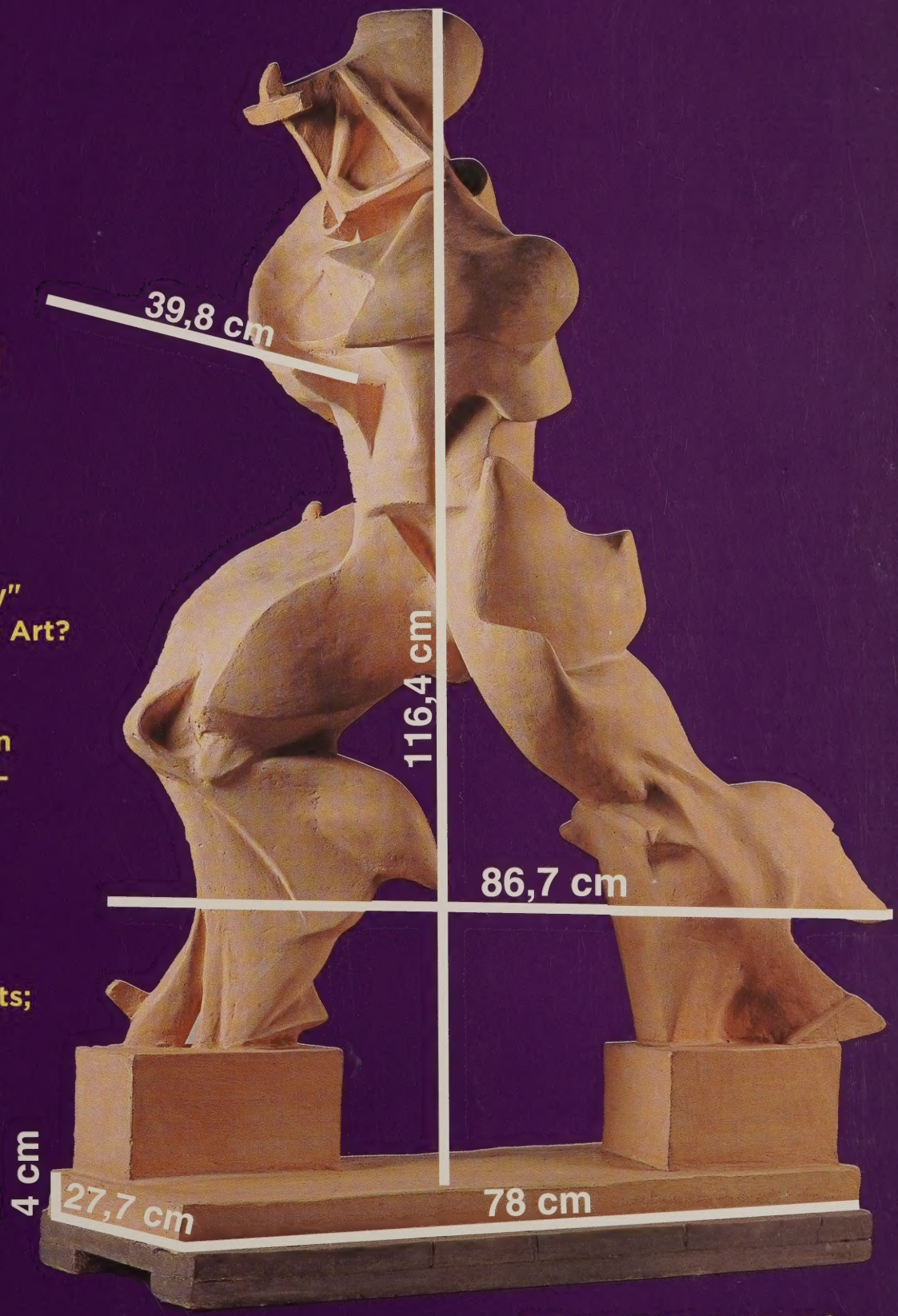

INCORPORATING STOLEN ART ALERT®

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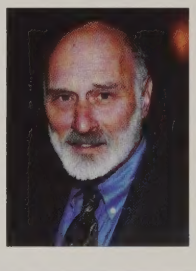
COVER: UMBERTO BOCCIONI (Italian, 1882-1916). ***Unique Forms of Continuity in Space,*** 1913. Plaster. Museu de Arte Contemporânea da Universidade de São Paulo, Brazil. Photo: Courtesy of MAC USP. See story on page 43.

IN MEMORIAM

DAVID ROSAND

(September 6, 1938 – August 8, 2014)

SCHOLAR, PROFESSOR, MENTOR
MEMBER, IFAR ART ADVISORY COUNCIL, 1999 – 2014



WE WILL MISS YOU

The directors and staff of IFAR were saddened to learn of the death in August of David Rosand, long time professor of Art History at Columbia University. Sharon Flescher, IFAR's Executive Director, and I had the pleasure of getting to know David as students in Columbia's graduate art history program, and I was fortunate to benefit from his renowned course on Venetian painting there as well as having him as a challenging albeit sympathetic examiner for my oral exams several years later.

As a member of IFAR's Art Advisory Council since 1999, David made himself available for consultation on works of art submitted to IFAR for review. In 2002, he delighted IFAR's members and friends with a fascinating evening of new insights on the connoisseurship of Old Master drawings,[1] a field which had attracted his interest for many years and for which he had especial sensitivity due to his early interest in becoming an artist himself before turning to art history.

David's contributions to Columbia University were legion. Having received both his undergraduate and graduate degrees there, he went on to teach Italian Renaissance art for nearly 50 years and, along the way, directed Art Humanities (Columbia's Core Curriculum program), and presided over the Columbia Society of Fellows in the Humanities. He was also instrumental in the creation of Columbia's teaching museum, the Ira D. Wallach Art Gallery, and later became its chairman. David further showed his loyalties to the university by taking over the chairmanship of the art history department not once but twice, and continued to give seminars after his official retirement as Meyer Schapiro Professor of Art History Emeritus in 2010.

In addition to his challenging schedule at Columbia, David published groundbreaking studies on Venetian Renaissance art and culture which, according to Professor Holger A. Klein, the current chair of the Department of Art History and Archaeology, "have profoundly shaped and inspired countless students and faculty colleagues on campus and around the world." David showed his love for the city of Venice by applying his talents for administration to the nonprofit art conservation organization Save Venice, where he served as project director during the last decade of his life.

Last but not least, David will be remembered for his approachability – a trait that made him a favorite with his students – sociable nature, and wit. In light of the latter quality, it is not surprising that the cartoonist Edward Koren and David were old friends from undergraduate days at Columbia. In fact, David co-curated a memorable exhibition of Koren's work at the Wallach Gallery in 2010, and wrote the accompanying catalogue entitled *Edward Koren, the Capricious Line.*

Those of us at IFAR extend our deepest sympathy to David's wife Ellen, and to their children and grandchildren.

GERTRUDE WILMERS
Member, IFAR Board of Directors

[1]An edited version of this lecture, "Beyond Connoisseurship? The Future Study of Master Drawings," was published in the *IFAR Journal,* Vol. 5, no. 4 (2002–2003).

EAST HAMPTON CON MAN KNOWN TO IFAR PLEADS GUILTY

JOHN RE ADMITS SCHULTE PROVENANCE WAS CONCOCTED

On December 1, as this *Journal* issue was in production, IFAR learned that John Re, a resident of East Hampton, Long Island, pleaded guilty in federal court in New York to one count of wire fraud in conjunction with a decade-long scheme that defrauded art collectors out of $2.5 million. The plea followed an intensive FBI investigation that led to Re's arrest in June and subsequent release on bail.

Although the court documents describe Re's crimes as dating back to "at least 2005," in fact, as early as 2001 IFAR became aware of Re and the so-called "George Schulte Collection" of purported Pollocks and de Koonings he was selling, when a "Pollock" with Schulte's name in the provenance was submitted to IFAR's Art Authentication Research Service. Other works with that provenance were later spotted on the Web. Years later, IFAR was presented with other Schulte "Pollocks," all of which were said to have been discovered in the basement of Schulte's house in East Hampton (the works and research will be discussed in detail in a forthcoming *IFAR Journal* article). None of the works submitted to IFAR turned out to be by Pollock. The June Criminal Complaint quotes extensively from IFAR's reports.[1]

In his recent Plea Agreement, Re admitted to having fabricated the Schulte provenance and authorship of the works. It is not clear at this point, who actually created the paintings, although the Criminal Complaint made note of the fact that Re himself is a painter; nor has the FBI said whether it is investigating others in connection with this fraud. Re faces up to 20 years in prison. Sentencing is scheduled for April 2015.

George Schulte (1922-1996), a woodworker and furniture restorer, was the owner of an antiques and appraisal shop in the Springs section of East Hampton, not far from where Pollock and Lee Krasner lived after 1945. In 1999, John Re, a former employee at the shop, claimed to have discovered a large group of paintings and drawings by Pollock and de Kooning while cleaning out the basement of the Schulte house.

The first Schulte "Pollock" submitted to IFAR in 2001, a small dripped painting on paper signed 'Jackson Pollock,' was accompanied by a notarized document bearing the signature of Schulte's widow, Barbara, stating that her late husband acquired the painting directly from Pollock sometime during the late 1940s or early 1950s presumably in lieu of payment for work performed at Pollock's house. Curiously, Re himself was a "witness" and signatory to the notarized statement.

> "The June Criminal Complaint quotes extensively from IFAR's reports."

IFAR was unable to substantiate the provenance, or find any evidence that Pollock knew Schulte, or had business dealings with him, let alone a relationship that would account for an exchange or a gift of paintings. More importantly, the work itself did not bear scrutiny as a Pollock, lacking the vitality and compositional integrity of Pollock's 1948 black and red dripped paintings on paper, which it superficially resembled. Just as troubling, the paper was anomalous for Pollock; the paint materials were wrong; and the work appeared to be intentionally "aged," executed as it was on a discolored, grimy, and creased piece of paper. IFAR rejected the attribution to Pollock.

1 *United States v. John Re*, no.14-cr-550 (PKC) (E.D.N.Y., *filed* June 20, 2014).

THE GROUP OF 45

In 2011, IFAR agreed to review a large collection of 45 purported Pollocks from the Schulte collection that had been acquired by a single collector, named in the government's Complaint as Collector 2. Most of the works were signed and some were dated (**FIGS. 1A** and **B**). We learned from the Complaint that John Re had tried to discredit IFAR in an unsuccessful attempt to dissuade Collector 2 from submitting the works to IFAR for review.

Each of the paintings in *this* group was submitted with a statement signed by Re identifying it as part of the Schulte collection. Unlike the 2001 document submitted to IFAR, Barbara Schulte did not sign these documents. By that time, she had been institutionalized with dementia; she has since died. IFAR's provenance research into this group included interviews with George Schulte's family and friends, all of whom denied that Schulte ever knew Pollock or had owned paintings by him.

FIGURES 1A and B. Fake Jackson Pollock works sold by John Re and later submitted to IFAR. 1A (upper) is a work on paper; 1B (lower) is a painting on canvas. Photos: IFAR.

Upon examination, the specialists found the paintings to be stylistically unconvincing and "remarkably, and disturbingly analogous in palette, composition, and overall execution, much more similar, in fact, than any of Pollock's authentic works are to each other." Forensic examination that IFAR undertook revealed serious anachronisms in the paint media used in virtually every work tested. There was nothing to substantiate a Pollock attribution, and IFAR rejected all 45 works.

RE CHANGES HIS STORY

In January 2014, three years after IFAR issued its reports on the 45 works, John Re contacted IFAR. Apparently forgetting that he himself had signed the provenance statements, each of which also contained an embedded image of the work, Re claimed that the paintings examined by IFAR were actually from the "Taylor Robinson Collection," and that the Pollocks had "already passed forensics & Top wold exoertise [sic]." He demanded that IFAR re-examine all of the paintings and amend its reports in light of this new information, hinting at legal action if IFAR did not comply. Needless to say, IFAR did not comply.

"In 2011, IFAR agreed to review a large collection of 45 purported Pollocks from the Schulte collection that had been acquired by a single collector, named in the government's Complaint as Collector 2."

In June, assisted by IFAR's research, Re was arrested for fraud. He was later indicted in August. The Complaint also accused him of making threatening statements – including boasting of his alleged mob connections — when he was confronted by one of his victims.

This was not Re's first encounter with the criminal justice system; in 1995, he, along with his wife, Rhonda, and two others, was charged with criminal possession of devices for printing counterfeit $20 bills. He served two years

in prison.[2] Upon his release, Re turned from counterfeiting money to dealing in fake art. Posing as an art expert who "exposed" fakes for sale on the Internet, Re posted glowing reviews of himself on his blog. One happy client gushed that Re had steered him away from buying a fake Picasso and a fake Pollock online, and claimed that Re had assisted "the FBI in New York in the prosecution of a major art forgery ring in 2000." Re himself sold dubious artworks from a variety of web sites including eBay, using shill bidders to drive up prices, and threatening those who challenged him or complained. In 2003, he was ordered to pay $43,500 in damages for breach of contract for selling fake Picasso and van Gogh paintings on eBay and for making defamatory statements against the plaintiffs.[3]

In the current case, in addition to facing imprisonment, Re has been ordered to forfeit $2.5 million and, until the forfeiture debt is paid, he is barred from selling his personal submarine, "USS Deep Quest," which he is said to have purchased from Universal Studios for $70,000 and restored for over $1 million. Perhaps not surprisingly, the authenticity of the submarine itself is in dispute. While Re claims it is a decommissioned US Naval vessel, naval experts say it is only a movie prop.[4]

— LISA DUFFY-ZEBALLOS
Art Research Director, IFAR

and **SHARON FLESCHER**
Executive Director, IFAR

2 John T. McQuiston, "4 are Held in Forgery of $20 Bills on L.I.," *The New York Times* (Oct. 19, 1995).

3 *Masterworks Fine Arts, Inc. v. Re,* no. 02-cv-3664 (E.D.N.Y., *filed* June 24, 2002).

4 T.E. McMorrow, "A Tale Forged in Paint and Steel," *East Hampton Star,* Aug. 14, 2014. The real USS Deep Quest is an exhibit at the Naval Undersea Museum in Keyport, WA.

• • •

IFAR ART AUTHENTICATION RESEARCH SERVICE

For more than forty-five years, IFAR has offered a unique Art Authentication Research Service, which works to resolve questions concerning the attribution of works of art. As a not-for-profit organization with a distinguished Art Advisory Council and a worldwide network of scholars, IFAR is free to render objective opinions unaffected by the marketplace.

IFAR offers its services to individuals, dealers, museums, and other institutions. We examine art only for the owner, or with the owner's consent. We are only able to accept a limited number of projects each year. As an educational organization, IFAR reserves the right to publish the results of its research.

For additional information, please call (212) 391-6234
or go to www.ifar.org.

A HAPPY ENDING FOR THE DETROIT INSTITUTE OF ARTS

In October 2013, when IFAR hosted an *Evening* on "Bankruptcy and the Detroit Institute of Arts,"[1] the situation of the DIA was grim. Its collection, one of the best in the U.S., was at risk to the creditors of the City of Detroit, which had filed for bankruptcy a few months earlier. Under an unusual structure, the DIA was owned by the City. Its artworks, ranging from ancient art to modern and comprising masterpieces by Brueghel, van Gogh, Bellini, and others, were viewed by many creditors as a valuable financial asset, appraised in the hundreds of millions of dollars, and more.

"The DIA, [the Judge] went on to say, 'stands at the center of the City as an invaluable beacon of culture, … civic pride and energy, … and economic development'."

After more than a year of discussions, negotiations, and proposals aimed at saving the collection for the people of Detroit, the situation ended happily for the museum on November 8, 2014. On that day, Steven Rhodes, the U.S. Bankruptcy Court Judge who sits in the Eastern District of Michigan, approved the so-called Grand Bargain restructuring plan designed to save the museum's collection while helping to reduce the impact that the bankruptcy would have on pensioners.

Under the plan, the museum will become a nonprofit organization independent of the City for the first time since 1919, when, ironically, ownership of the collection was transferred to the city – at that time a wealthy industrial metropolis – in order to ensure the museum's financial stability. With money totaling $816 from a coalition of funders – foundations in and outside of Detroit; the state of Michigan; and the DIA itself, which committed $100 million dollars – the plan also assures that some of the negative effect of the City's bankruptcy on pensioners will be mitigated.

While the Judge did not say that the selling of the DIA artworks would be illegal, he did say that he was persuaded by the museum's arguments that it would be illegal and he hinted that the museum would likely "prevail" in court, but only after a long and costly legal fight. And, he added, "it would have been difficult for the City to endure the delay and expense while at the same time attempting to revitalize itself."

More significantly, perhaps, Judge Rhodes gave a ringing endorsement of the value of the museum and its collection to the people and City of Detroit. He called the museum "critical to the City's plan of adjustment and to the City's future. The DIA, he went on to say:

> "stands at the center of the City as an invaluable beacon of culture, education for both children and adults, personal journey, creative outlet, … civic pride and energy, … and economic development. Every great City in the world actively pursues these values. They are the values that Detroit must pursue to uplift, inspire and enrich its residents and its visitors."

—S.F.

• • •

1 "Art for Sale? Bankruptcy and The Detroit Institute of Arts," and *IFAR Evening* on October 24, 2013. This program was videotaped and can be seen on IFAR's website: www.ifar.org. An edited written version, with updated information, was published in of the *IFAR Journal,* Vol. 14, no.4/ 15, no.3.

NEW YORK TAX COURT DENIES DEALER REFUND ON FORGED BELTRACCHI PAINTING

After being denied a sales tax refund for a Max Ernst painting that it sold in 2004 and that was determined years later to be a fake by German master-forger Wolfgang Beltracchi, the art gallery Richard L. Feigen & Co. has decided not to appeal to the Tax Appeal Tribunal. On July 10, 2014, the New York Division of Tax Appeals held that the three-year statute of limitations barred Feigen & Co. from reclaiming a tax payment of $215,625. The court's strict application of New York Tax Law §1139 underscores the incompatibilities that may arise between bright-line legal time constraints and the many years often required for art experts to re-assess the attribution of a painting.

More than eight years elapsed between gallery owner Richard Feigen's acquisition of the painting on behalf of a client and the realization that it was a fake. In September 2003, Feigen & Co. purchased *Forêt* **(FIG. 1)**, believed to be by Max Ernst, from Galerie Daniel Malingue in Paris. Feigen & Co. paid $2,350,000 for the artwork, which bore Ernst's signature. It obtained a Certificate of Authenticity issued by Werner Spies, an Ernst expert and personal friend of the artist. Having examined the authenticity documents, Feigen & Co. sold the painting to a private collector for $2.5 million in January 2004. The following month, Feigen paid the then 8.625% sales tax, or $215,625, to New York State.

It was not until late 2010 that Feigen had reason to doubt the painting's attribution. In October of that year, news had broken of a major forgery scheme perpetrated by Beltracchi, and Beltracchi and others were arrested in Germany. The fakes he produced were sophisticated enough to have fooled even a scholar like Spies.

Two months later, Malingue contacted Feigen to alert him that *Forêt* might be inauthentic. After receiving the same notice from Berlin police in early 2011, Feigen submitted the painting for forensic analysis. The results of the exam, which stated that "rigorous investigation [has led examiners to] at least include a consideration of the possibility that an intentionally misleading object was created," were detrimental enough for Feigen & Co. to conclude that the painting was worthless and that his client was entitled to a refund. He refunded the full sales price of $2.5 million, plus the $215,625 sales tax.

FIGURE 1. Painting entitled *Forêt*, acquired as a Max Ernst but later found to be a Beltracchi fake. Photo: Courtesy of Richard L. Feigen & Co.

Although Feigen was reimbursed by Malingue for the purchase price, as well as the shipping expenses incurred when it submitted the painting for forensic examination, the gallery still suffered a sizeable loss from the sales tax paid seven years earlier. In June 2011, the day after reimbursing his client, Feigen filed for a refund to the New York Division of Taxation. He claimed that the statute's three-year limitation did not apply to his case because he had not, as outlined by New York Tax Law §1139(a), "erroneously, illegally, or unconstitutionally" paid the tax. He also stated that because the painting was a fake that had been fraudulently misrepresented to him as an original, he had never actually acquired title or the ability to transfer it.

When the Tax Division rejected the claim, Feigen took his case to the Appeals Division, which unyieldingly affirmed the lower court's holding on the grounds that refunds of taxes paid on cancelled sales and returned property must be subject to the time limit as per §1139(c). Additionally, the court refused to apply New York's Civil Practice Law and Rules (CPLR) §213, which pertains to actions based on fraud and which would have given Feigen two years to file his claim after he had discovered the fraud.

"... The court's underlying justification seemed to be based on public policy. [It was] a balancing test that weighed the rights of taxpayers against the State's need to manage its financial resources and operations. ..."

Although Feigen offered a number of additional arguments, the court rejected all of them, including his Equal Protection and equity-based claims. Feigen asserted that a denial of his refund would result in a violation of the Fourteenth Amendment's Equal Protection Clause by causing him to be treated differently from others in a similarly situated class of taxpayers, by forcing him to pay more than the required percentage based on his sales revenues. Refuting this line of reasoning, the court stated that Feigen was being treated just like any other vendor with regard to sales tax on cancelled sales, and added that as an art merchant, Feigen & Co. was assuming the risk of a painting's inauthenticity each time it made a sale.

Regarding Feigen's equity claim, wherein he asserted that a refusal to refund his tax payment would result in an over-payment by a taxpayer and an over-collection by the State, the court relied once again on §1139's three-year statute of limitations on the grounds that it was a reasonable amount of time to allow taxpayers to correct their errors.

While §1139 seemed to rationalize the outcome in both the lower court and the Appeals Division, the court's underlying justification seemed to be based on public policy. In a balancing test that weighed the rights of taxpayers against the State's need to manage its financial resources and operations, the court cited the Tax Appeal Tribunal's decision in *Matter of Renaud v. Mattingly* (2010), wherein the Tribunal had stated that "anything less than this degree of certainty would make the financial operation of government difficult, if not impossible."

The Tax Tribunal's stated "need for certainty," as well as its clear-cut refusal to apply CPLR §213 when a case could fall under Tax Law §1139, sheds light on the incompatibility between the law's frequent esteem for bright-line rules and the murky uncertainties that often surround evaluations of an artwork's authenticity. Given the promptness with which Feigen acted during every step of this long battle to reclaim his tax payment, this case also makes it clear that the art world and the legal world sometimes operate on very different, and conflicting, timelines.

— KEUNJUNG CHO,
IFAR Legal Intern
and **S.F.**

• • •

T-SHIRT CASE CREATES CIRCUIT SPLIT ON FAIR USE; WILL THIS BRING U.S. SUPREME COURT ATTENTION?

The Seventh Circuit Court of Appeals in Chicago issued an opinion in September—on, of all things, a case concerning T-shirts—that sharply criticized the Second Circuit of New York's recent ruling in *Cariou v. Prince,*[1] a copyright case that IFAR closely followed.[2] Although both courts sided with the alleged infringers (in the NY case, that meant the artist Richard Prince and the Gagosian Gallery), the Seventh Circuit not only employed different reasoning to reach its unanimous decision, it pointedly disagreed with the Second Circuit's rationale that a use of copyrighted material need only be "transformative" to be a "fair use." Instead, the Seventh Circuit said that it preferred to "stick with the statutory list" and apply the four fair-use factors enumerated in the Copyright Act. The emergence of a Circuit split on the issue may spur the U.S. Supreme Court, which declined to review the *Cariou* decision last year, to address the muddled "fair use" doctrine now.

The facts of the Seventh Circuit case, *Kienitz v. Sconnie Nation, LLC*[3], are not in dispute. Michael Kienitz, a photographer, alleged that Sconnie Nation and Underground Printing-Wisconsin infringed his copyrights in an official portrait of Madison, Wisconsin Mayor Paul Soglin by screen-printing it onto T-shirts and tank tops that were sold in connection with the 2012 Mifflin Street Block Party. The defendants created the shirts to highlight the fact that Soglin, who now sought to shut down the annual event, had launched his political career in 1969 after attending and being arrested at the first Mifflin Street Block Party, which emerged as part of the student protest movement on the University of Wisconsin–Madison campus.

Amused by Soglin's about-face, a local apparel company, Sconnie Nation, created T-shirts based on Kienitz's photo of Soglin, which it downloaded from Soglin's official website. Kienitz's photograph was altered to make Soglin's face lime green and the phrase "Sorry for Partying" was added in neon letters. **(FIG. 1)** Fifty-four shirts were sold for $24.99 each, and 107 additional shirts were made but not sold. Kienitz sued Sconnie Nation and Underground Printing-Wisconsin, which earned a gross profit of $910.44 on the venture, for copyright infringement.

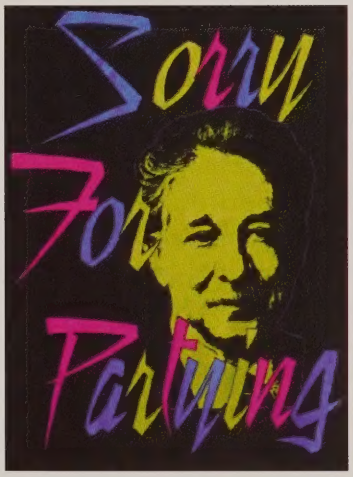


FIGURE 1. T-shirt that the Seventh Circuit ruled does not infringe the original photograph. Photo: Court documents.

The parties cross-moved for summary judgment in the federal court for the Western District of Wisconsin in 2013 on the issue of whether the defendants' use of the photo was a "fair use" as set forth in Section 107 of The Copyright Act of 1976. There are four non-exclusive factors to be considered in determining whether

1 *Cariou v. Prince,* 714 F.3d 694 (2d Cir. 2013).

2 See *IFAR Journal,* Vol. 12, no. 3 (2011), Vol. 14, nos. 1 & 2 (2013), Vol. 14, no. 3 (2013), and Vol. 15, no. 2 (2013).

3 *Kienitz v. Sconnie Nation, LLC,* no. 13-3004, slip op. (7th Cir. Sept. 14, 2014).

a particular use of a copyrighted work is "fair," and therefore non-infringing:

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for, or value of, the copyrighted work.

Addressing the first factor, the lower (district) court cited the *Cariou* decision in deciding that the defendants' "monochromatic outline of Mayor Soglin's image in a Paschke-esque neon green" was a "robust transformative" use of the original photo. The court emphasized that the defendants had no intention of supplanting Kienitz's commercially valuable right with their sophomoric humor, but instead had used the photo as "raw material to create something entirely new with a different aesthetic, message, or meaning."[4]

The district court attributed little weight to the second factor, as it favored neither side.

As to factor three, the court concluded that the artistic elements such as lighting, expression, and a pose attributable to the photographer "fade to insignificance … if they do not evanesce completely" on the shirts as compared with Kienitz's original photo.[5] Thus, factor three weighed in favor of fair use because the amount and substantiality of the photo used by the defendants was "reasonable in relation to the purpose of the copying."

Turning to factor four, which the Supreme Court has called the "single most important element of fair use,"[6] the court stated: "viewing the two images side by side is enough to establish that defendants [...] shirts were not a substitute for and did not reduce the demand for Kienitz's photographic portrait of Mayor Soglin" because "anyone seeking a photographic portrait – or even just an accurate representative image – of the mayor would not even consider the garish image of the mayor splashed onto the defendants' […] shirts."[7]

In sum, the court held that factors one, three, and four favored the defendants and that factor two was "pretty much a toss-up." As a result, the defendants' use of Kienitz's photo was a fair use as permitted by the Copyright Act.

Kienitz appealed to the Seventh Circuit Court of Appeals, which heard the case in January 2014. In its September 14 opinion, the appellate court noted that "the district court and the parties debated whether the T-shirts are a 'transformative use' of the photo – and, if so, just how 'transformative' the use must be."[8] The appellate court continued, "That's not one of the statutory factors …" Acknowledging that the Supreme Court mentioned "transformative" use in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (the most recent Supreme Court fair use case), the Seventh Circuit opined that "The Second Circuit has run with the suggestion and concluded that 'transformative use' is enough to bring a modified copy within the scope of §107 … We're skeptical of [that] approach, because asking exclusively whether something is 'transformative' not only replaces the list in §107 but also could override [the section that] protects derivative works." Bluntly, the appellate court then said, "we think it best to stick with the statutory list."

4 *Kienitz v. Sconnie Nation, LLC*, 965 F. Supp. 2d 1042, 1050 (W.D. Wis. 2013).

5 *Ibid.* at 1052.

6 See *Harper & Row v. Nation Enter.*, 471 U.S. 563, 566 (1985).

7 *Kienitz*, 965 F. Supp. at 1053-54.

8 *Kienitz v. Sconnie Nation, LLC*, no. 13-3004, slip op. at 4 (7th Cir. Sept. 14, 2014).

In its analysis of the allegedly infringing T-shirts, the Seventh Circuit focused on the fourth factor, asking "whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited)." It then stated the obvious—"a t-shirt or tank top is no substitute for the original photograph."[9]

The only other factor that the Seventh Circuit found had "any bite" in the litigation was factor three, the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Finding that this also weighed in favor of the defendants, the court stated that they had removed so much of the original that "as with the Cheshire Cat, only the smile remains."[10] The court discarded the other factors as of little importance in the case.

In sum, the appellate court held that the district court had reached the right conclusion, albeit via the wrong reasoning, and affirmed its judgment that the defendants' T-shirts were a fair use of Kienitz's photograph. Although Kienitz requested a rehearing en banc of that decision, his petition was denied.

The Seventh Circuit's open criticism of the Second Circuit's fair use analysis in *Cariou,* which has also been widely criticized by legal practitioners and copyright experts, creates a "Circuit split" on the role of transformative use in the fair use doctrine. This may prompt the Supreme Court to address the issue, which it hasn't considered in 20 years. First, we must wait to see whether Kienitz files a petition for *certiorari* asking the Supreme Court to review the decision.

— ANN-MARGRET GIDLEY
IFAR Legal Associate

9 *Ibid.* at 4.

10 *Ibid.* at 5.

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CODA ON MUMMY MASK – GOVERNMENT GETS SLAMMED WITH LEGAL FEES

As if to add insult to injury, the St. Louis Art Museum (SLAM) didn't rest after getting the U.S. government's forfeiture suit against it for the Ka-Nefer-Nefer funerary mask thrown out in June. The museum asked the government to reimburse its legal fees, and on October 14, a federal court ordered the government to pay $425,000.

This puts a final (albeit controversial) end to the case that IFAR has been following for more than a decade[1] concerning a 3,200 year old 19th Dynasty relic that entered the museum's collection in 1998. The U.S. alleged that the work had been stolen from a storage facility in Egypt approximately 15 years earlier. A district court dismissed the government's suit in March 2012, saying the Complaint was "completely devoid of any facts" showing that the mask had been stolen[2] and the Eighth Circuit Court of Appeals affirmed that ruling earlier this year.[3] The government chose not to appeal.

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1 See *IFAR Journal.* Vol. 8, no. 2 (2005-06), Vol. 12, no. 4 (2011), Vol. 13, no. 4 (2013). Vol. 14, no. 4 (2014), and Vol. 15, no. 2 (2014).

2 *United States v. Mask of Ka-Nefer-Nefer,* no. 11-cv-504 (HEA) (E.D. Mo. Mar. 31, 2012).

3 *United States v. Mask of Ka-Nefer-Nefer,* Civ. no. 12-2578 (8th Cir., Jun. 12, 2014).

PUNISHMENT FOR TWO JASPER JOHNS FRAUDSTERS

Depending upon how you look at it, this was either a good or bad period for renowned artist Jasper Johns (b. 1930). Two people who betrayed him – his former studio assistant, who stole at least 22 works from him, and a former bronze foundry owner, who made and tried to sell an unauthorized cast – were recently brought to justice. Both pleaded guilty, and in November, the founder/forger was sentenced to 30 months imprisonment, while Johns' former assistant is scheduled to be sentenced in January (2015).

THE *FLAG* FRAUD

Let's start with the unauthorized bronzes. Brian Ramnarine, the former owner of the Empire Bronze Art Foundry in Long Island City, Queens, was arrested in 2012 when he attempted to sell an unauthorized bronze cast **(FIG. 1)** of an iconic Johns *Flag* sculpture to a private collector for $11 million.[1] The fraud dated back to 1990, when Johns hired Ramnarine to make a wax cast of a mold of his 1960 Sculptmetal *Flag* painting, one of many Johns works based on the American flag and other recognizable symbols. Johns had given the 1960 painting to his fellow artist and friend Robert Rauschenberg, but years later, he created the mold in order to cast sculptures. Ramnarine created the wax cast for Johns, but never returned Johns' mold, despite instructions to the contrary.

FIGURE 1. Unauthorized and disavowed bronze cast of Jasper Johns' 1960 *Flag* painting, fraudulently passed off by Brian Ramnarine as an authentic work. Photo: Manhattan U.S. Attorney's Office.

Not long after that, according to recent court testimony, Johns was shown an unauthorized *Flag* sculpture, purportedly dated "1989", which he believed came from the mold.[2] Johns scratched out the fake signature that had been put on the back and broke off ties with Ramnarine, whose craftsmanship, he later testified, he had greatly admired.

Almost twenty years later, in 2010, another, also purportedly authentic Johns bronze *Flag* sculpture surfaced, which Ramnarine had directed various brokers to sell. When an interested but skeptical buyer expressed doubt as to its provenance (it is well known in the field that Johns produced only six casts of the work, one of which is in the White House, a gift by Johns' dealer Leo Castelli to President Kennedy in 1963), Ramnarine said that the sculpture was a gift to him from Johns, and then backed his story with fraudulent documents, including a forged Johns letter dated August 23, 1989. In fact, the sculpture was an unauthorized cast made from the *Flag* mold that Ramnarine had kept without permission. Ramnarine dated the sculpture "1989," forged Johns' signature on the back, and forged (or had someone else forge) additional documents to lend the appearance of authenticity. He didn't succeed. The FBI got involved, contacted Johns, and, in November 2012, Ramnarine was arrested and charged with wire fraud and was then released on bail.

1 *U.S. v. Ramnarine,* 12-cr-826-001 (JGK) (S.D.N.Y. filed Nov. 15, 2012).

2 See Colin Moynihan, "Artist Testifies that a Reproduction of a Famous Work Wasn't Authorized," *New York Times,* Jan. 23, 2014.

Not quick to learn his lesson, Ramnarine pulled a similar scam with other artists while out on bail: he sold two fake Robert Indiana sculptures and numerous unauthorized Saint Clair Cemin sculptures to the online RoGallery, also based in Queens. Federal prosecutors found out and added two more counts of wire fraud for his latest swindle to the already pending charge against him.

Initially maintaining his innocence, Ramnarine had a change of heart in the midst of his trial in February 2014 and pleaded guilty, but only *after* Johns, who is famously private (some might say reclusive), traveled to New York to testify on the witness stand that the work Ramnarine attempted to sell for $11 million was not an authorized copy. Johns was unequivocal: "I know what I do to authorize [my work] and this isn't mine … it's finished in a way I wouldn't finish it, the frame has been polished … the signature appears to have been done photographically and there is a copyright symbol, which I would never use." Johns explained that he had never asked Ramnarine to make a bronze cast, only a wax impression: "I was investigating the possibility of casting in gold," he said, "and I needed the wax to see what the price would be."

On October 21, Ramnarine was sentenced to 30 months in prison and three years of supervised release and was ordered to forfeit $34,250 and pay restitution to the gallery. Given the maximum 80-year sentence he potentially faced on the three wire fraud charges, Ramnarine exclaimed "Love it!" when Judge John G. Koetl of the Southern District of New York imposed the sentence.

This was not the first time that Ramnarine was prosecuted for fraud. In 2002, he defrauded two art collectors of $140,000 by selling them unauthorized and worthless copies of metal sculptures that he claimed had been authorized by Saint Clair Cemin, Joel Fisher, and Kenny Scharf. Facing up to 15 years in prison for those actions, Ramnarine pleaded guilty and was sentenced to five years probation and ordered to pay $100,000 in restitution.

"Johns was unequivocal: 'I know what I do to authorize [my work] and this isn't mine … it's finished in a way I wouldn't finish it, the frame has been polished … the signature appears to have been done photographically and there is a copyright symbol, which I would never use'."

AN ASSISTANT'S BETRAYAL

In the other recent case,[3] no doubt the bigger betrayal for Johns, James Meyer, Johns' studio assistant for 27 years (1985-2012), was prosecuted this year for stealing unfinished authentic works from Johns' studio in conjunction with a multi-year scheme to sell the works to unwitting buyers. Over a period of approximately six years (2006 – 2012), the scheme netted him almost $3.4 million.

As part of his responsibilities, Meyer had access to a file drawer in Johns' studio containing incomplete works by Johns. According to the indictment, Meyer removed at least 22 items from the drawer and consigned them to a Manhattan gallery, unnamed in the indictment but later revealed in a civil suit initiated by one of the defrauded buyers to be Dorfman Projects LLC, owned by Fred Dorfman.[4] Meyer provided sworn, notarized certificates of authenticity and also said that he had received the works as gifts directly from the artist. Not insignificantly, Meyer conditioned the sale of the

[3] *U.S. v. Meyer,* 13-cr-604-JPO (S.D.N.Y. filed Apr. 24, 2014).

[4] *Kolodny v. Meyer, et al.,* 14-cv-3354 (VSB) (S.D.N.Y. filed May 8, 2014).

works upon signed agreements from the purchasers that the art would not be loaned, exhibited, or re-sold for at least eight years, on the pretense that he did not want Johns, for whom he still worked, to learn that he had sold the gifts.

To cover up his thievery, Meyer created fictitious inventory numbers for the stolen works, or assigned numbers belonging to other pieces. He also created fake pages in a ledger book maintained at the studio and blatantly misrepresented to the Dorfman Gallery and others that several of the stolen items would be included in a forthcoming catalogue raisonné of Johns' works.

His precautions were not enough. In 2012, someone apparently checked one of the works to verify whether it would be in the catalogue raisonné. Johns learned about it and Meyer was fired.[5] In August 2013, Meyer was indicted for violating the National Stolen Property Act and for committing wire fraud.

Although he initially entered a plea of not guilty, in August 2014, he pleaded guilty to reduced charges. Accepting his plea, the U.S. District Court for the Southern District of New York ordered him to pay $3,992,500 – a few hundred thousand more than his share of the $6.5 million proceeds from the sale of the stolen items. As IFAR went to press, Meyer was scheduled to be sentenced on January 23, 2015. He faces up to 46 months in prison.

But, as already noted, the case continues in civil court. Frank Kolodny, a disgruntled purchaser of a small black and white drawing for $400,000, has sued not only Meyer, but Fred Dorfman and his gallery, which helped Meyer sell the 22 works. Kolodny is alleging fraud, asserting that Dorfman was complicit in the scheme and ignored too many red flags to be considered an innocent.

As it happens, Kolodny didn't purchase the Johns work directly from Dorfman, but rather through another respected Manhattan dealer, Francis Naumann, who himself was duped when he was approached by Dorfman in 2009 to help sell the work. Although Naumann, who was not named in Kolodny's suit and knows Johns personally, did undertake some precautions on behalf of Kolodny, including getting a sworn affidavit from Meyer saying that the work was a gift and asking Dorfman to send a copy of Johns' record indicating that it was a gift, even getting Meyer to agree to void the 8-year embargo on selling or lending the work if he stopped working for Johns,[6] the precautions were not enough. Now that Meyer has pleaded guilty, it is not clear what will happen with the civil case. Nor, do we know whether other purchasers are planning similar suits. Thus far, none have been filed. But whatever the outcome of the suits, it is a safe prediction that Jasper Johns will not feel any less betrayed, although he can take some satisfaction that his rare public appearance on the witness stand helped put one of the fraudsters behind bars.

— **S.F** and **A.M.G.**

[5] On this point, see Robert Kolker, "The Betrayal of Jasper Johns: How an Ambitious Assistant Earned his Trust and Stole his Work," in *New York Magazine*, November 17, 2014.

[6] Ibid.

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CALIFORNIA RESALE ROYALTIES CASE REVIVED

NATIONAL LEGISLATION STALLS IN CONGRESS

A California class action lawsuit brought by several artists and artists' foundations seeking resale royalties took an unexpected turn on October 30, when a federal Court of Appeals announced that a full panel of judges (en banc) would re-hear the case, which had seemed dead in the water.[1] In 2012, a lower court struck down the California Resale Royalties Act ("CRRA"), a 1976 state statute that entitled visual artists to royalties when their works were resold.[2] A three-judge panel of the Ninth Circuit Court of Appeals was in the process of reviewing that judgment, but the October announcement came before the panel issued an opinion. Meanwhile, proposed legislation to create a national resale royalty right was unable to make it out of the 113th Congress. A version will likely be reintroduced in the next congressional session.

Although artists' resale rights have long been recognized in Europe (known there as *droit de suite*), the California Act was the only law of its kind in the United States. The CRRA entitled artists and their heirs (for a period of 20 years after the artist's death) to a 5% royalty on the total sale amount whenever their works sold for more than $1,000. Although the law had been on the books for more than 35 years before it was struck down, many artists have claimed that it was frequently ignored.

Hoping to change that, artist Chuck Close and the estate of sculptor Robert Graham invoked the CRRA in October 2011 when they sued Sotheby's in federal court in California to collect unpaid royalties.[3] They alleged that Sotheby's had engaged in a "custom and practice" that made it very difficult for artists to identify sales that were subject to the royalty. Christies was named in related suits brought by the Sam Francis Foundation,[4] and the cases were consolidated

In May 2012, the United States District Court for the Central District of California struck down the CRRA in its entirety in the consolidated case, concluding that the law violated the Commerce Clause of the U.S. Constitution because it attempted to regulate "commerce occurring wholly outside" the state of California.[5] For example, said the court, the CRRA would hypothetically apply to a sale taking place within New York State of an artwork by a New York artist to a New York resident, with the only California link being a seller living in California. The Commerce Clause reserves to the federal government the right to regulate commerce *between* states.

The plaintiff artists appealed that decision to the Ninth Circuit Court of Appeals, which heard arguments as a three-judge panel last April. Normally, a litigating party can request that a fuller panel of the Ninth Circuit review a three-judge panel's decision, but the case was fast-tracked prior to the decision because of recent decisions in two other, seemingly unrelated

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1 *Sam Francis Found. v. Christie's, Inc.*, no. 12-56067 (9th Cir. appeal docketed June 8, 2012); consolidated with *Sam Francis Found. v. eBay, Inc.*, no. 12-56077 and *Estate of Robert Graham v. Sotheby's*, no. 12-56068.

2 Cal. Civ. Code § 986.

3 *Estate of Robert Graham v. Sotheby's, Inc.*, no. 11-cv-08604 (C.D. Cal.).

4 *Sam Francis Found. v. Christie's Inc.*, no. 11-cv-08605 (C.D. Cal.).

5 *Estate of Robert Graham v. Sotheby's Inc.; Sam Francis Found. v. Christie's, Inc., 860* F.Supp.2d 1117 (2012).

California cases — one about carbon dioxide emissions and another about foie gras[6] — which resulted in potentially conflicting conclusions. As IFAR goes to press, the Ninth Circuit was scheduled to re-hear arguments in the *droit de suite* class action *en banc* on December 16.

6 The Ninth Circuit asked the parties to address whether there is a conflict in its case law regarding the applicability of *Healy v. Beer Inst.*, 491 U.S. 324 (1989), instructing them to compare *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) ("[T]he dormant Commerce Clause holds that any 'statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority.'" (quoting *Healy*, 491 U.S. at 336)) with *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) ("[T]he [Supreme] Court has held that Healy … [is] not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.'") (citation omitted).

WILL THERE BE A FEDERAL LAW?

While the California *droit de suite* class action has been winding its way through federal court, the American Royalties Too (ART) Act, which seeks to create a national royalty right for visual artists and was introduced into both houses of Congress earlier this year, expired without further action.

New York Rep. Jerrold Nadler introduced the bill (H.R. 4103) to the House of Representatives on February 26, 2014 and an identical bill (S. 2045) was introduced in the Senate, co-sponsored by Rep. Tammy Baldwin (Wisconsin) and Rep. Ed Markey (Mass.). ART would have affected works sold for at least $5,000 at an auction house (not galleries) with at least $1 million in visual art sales in the previous year. It provided a 5% royalty with a $35,000 cap for works sold during an artist's lifetime, plus 70 years (concurrent with copyright). At the November Conference of the Appraisers Association of America, Rep. Nadler reaffirmed his commitment to resale royalties and his intention to pass legislation. Although the bill's original co-sponsors were re-elected, it is not clear whether and how the shift in the Congressional leadership from Democrat to Republican will affect the proposed legislation. Auction houses and other critics of resale royalties have lobbied extensively against the bill, arguing, amongst other objections, that the law will harm the art market in the U.S. while mainly benefiting successful artists.

— **A.M.G** and **S.F.**

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LETTERS TO THE EDITOR

REMINDER

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SUIT AGAINST OKLAHOMA MUSEUM RAISES NEW QUESTIONS ABOUT NAZI ERA WORKS

Although the American Alliance of Museums (AAM), formerly known as the American *Association* of Museums, was recently dropped as a co-defendant in a case involving a Nazi-looted Pissarro at the University of Oklahoma,[1] the claim brought the museum membership organization under scrutiny. It raised the issue of whether the standards and guidelines regarding Nazi era artwork promulgated by professional organizations, such as the AAM, are meant to serve merely as recommendations or, rather, as requirements subjecting violators to sanctions or even expulsion.

The lawsuit was filed by the daughter of Raoul Meyer, the French-Jewish owner of the Parisian department store Galeries Lafayette. In 1940, Meyer hid his art collection, including an 1886 Camille Pissarro painting, *Bergère rentrant des moutons* ("Shepherdess Bringing in Sheep"), also known as *La Bergère* **(FIG. 1)**, in a bank vault. In 1941, the Nazis found, and seized, the collection. When they evacuated France in 1944, the Nazis shipped *La Bergère,* along with many other looted Salzburg works, to Switzerland.

Meyer located the painting in Switzerland in 1951 and filed suit for its return. Swiss law, however, subjected works looted during the war to a 5-year statute of limitations, ending in 1950, after which claimants, such as Meyer, were required to prove that the current possessor of a work had acquired it in bad faith. In 1953, a Swiss court ruled that Meyer had failed to prove that the current possessor, Christoph Bernoulli, had acquired *La Bergère* in bad faith. The court reached this conclusion despite the fact that in 1946 the U.S. Art Looting Investigation Unit had listed Bernoulli as an "individual involved in art looting."[2]

Following the Swiss court's ruling, Meyer lost track of the painting. Unbeknownst to him, *La Bergère* resurfaced in New York at the David Findlay Gallery in 1957, where it was purchased by Aaron and Clara Weitzenhoffer for $14,000. In 2000, the Weitzenhoffers bequeathed their substantial art collection, including *La Bergère*, to the University of Oklahoma's Fred Jones Museum.

Léone Meyer, Raoul Meyer's daughter and sole heir, learned the whereabouts of the painting in 2012 and contacted the University of Oklahoma seeking its return. David Boren, President of the University, asserted that the school had legal title to the work, as the Weitzenhoffers' were good faith purchasers and had owned the painting for over four

". . . [Are] standards and guidelines regarding Nazi era artwork promulgated by professional organizations, such as the AAM, meant to serve merely as recommendations or, rather, as requirements subjecting violators to sanctions or even expulsion?"

1 *Meyer v. University of Oklahoma*, no. 1:13-cv-03128 (S.D.N.Y. May 14, 2014).

2 O.S.S. Art Looting Investigation Unit: Final Report, May 1946.

decades before donating it to the museum. Meyer responded by filing suit in January 2014. Meyer argued that the University museum's membership in the AAM, a professional organization with over 3,500 member museums, including approximately 440 university museums, created a binding contract that required the museum to follow what she referred to as the organization's Code of Ethics. In point of fact, the text she referenced did not come from the AAM's Code of Ethics, but a separate document entitled "Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era" (the "Nazi Era Standards"), written in 1999 and amended in 2001.

FIGURE 1. CAMILLE PISSARRO, ***Bergère rentrant des moutons (Shepherdess Bringing in Sheep)*, 1886, also known as *La Bergère*.**

This document, as well as a similar one written by the Association of Art Museum Directors (AAMD), called for member institutions to conduct substantial research into the provenance of works such as *La Bergère*, which had changed hands during the Nazi era. The Fred Jones Museum's failure to conduct that research, Meyer asserted, constituted a breach of contract in which the original owners of Nazi looted art, including her, were the intended beneficiaries.

Meyer subsequently added the AAM and AAMD as co-defendants, on the grounds that they had failed to enforce their "Codes of Ethics" by not expelling the Fred Jones Museum for violating the Codes. This is believed to be the first time that a plaintiff in a Nazi era restitution case sought to hold the AAM or AAMD liable for the actions of a member institution.

Meyer's claim highlighted a portion of the AAM's Nazi Era Standards, which states in part:

> When appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era without subsequent restitution. … [In] order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.[3]

In its response, the University argued that Meyer's claim for *La Bergère* was barred by the doctrine of *res judicata* because the issue had already been litigated by her father and adjudicated by a Swiss court in 1953. Moreover, it added, the Fred Jones Museum was not even a member of the AAMD and thus was not bound by any of that organization's guidelines. In fact, the University alleged that Meyer had only included the New York-based AAMD in her lawsuit in an attempt to have the case heard in New York.

The Fred Jones Museum is, however, an accredited member of the AAM, but the museum argued that the AAM's Nazi Era Standards were only "non-binding, voluntary guidelines" and were "not intended to create legal obligations."

The AAM would likely have made a similar argument, but, in May 2014, before the AAM could respond, Meyer's suit was dismissed by a New York court on the grounds that the court

[3] American Alliance of Museums, *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era* at http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era

lacked jurisdiction and the suit should be re-filed in Oklahoma. Shortly thereafter, Meyer dropped both the AAM and AAMD from the case.

Despite no longer being a party to the case, the AAM has come under fire from an Oklahoma lawmaker as well as the World Jewish Restitution Organization (WJRO) for its action, or rather inaction, with respect to the Fred Jones Museum.

In October 2014, Oklahoma State Representative Mike Reynolds called for the AAM to investigate the museum and determine whether, by acquiring *La Bergère,* the museum had violated the AAM's standards and should be subject to the loss of its accreditation. The president of the AAM, Ford Bell, responded by stating that the AAM's Accreditation Commission does not review the "ethical or compliance concerns" of its member institutions while legal action is pending, and that it "is not a legal body."[4]

Both Reynolds and the WJRO condemned Bell's comments and the AAM's inaction, with Reynolds stating that "a professional accreditation organization as prestigious as AAM does not get to choose when it wants to enforce its Code of Ethics.[5] Either it does [enforce it], or it does not."[6]

In a November 11, 2014 letter to Bell, accompanied by a press release, the WJRO asserted that the fact that "legal steps have been taken by a claimant does not excuse the American museum community from ensuring, through vigorous review, that the principles laid down in the AAM Code of Ethics are indeed being applied by American museums."[7]

Bell reiterated the AAM's position in a November 17, 2014 press release of his own: "The AAM will not review an allegation of unprofessional practices" against a museum while "there are [ongoing] legal proceedings" and "until that litigation is concluded, the AAM cannot and should not review the matter."[8]

Although the AAM has investigated museums for a variety of alleged violations in the past, the only violation that has led to disaccreditation is the selling of works from a collection to pay for operating expenses, a breach of one of the museum community's most fundamental principles, applicable to all museums, not only art museums. As recently as June 2014, the Delaware Museum of Art suffered this punishment, losing its accreditation for selling an 1868 painting by William Holman Hunt to pay operating expenses.

In spite of the criticism the AAM has faced, it seems unlikely that violating its Nazi Era Standards, as the Fred Jones Museum is alleged to have done, will result in a museum losing accreditation anytime soon. Indeed, given the sheer number and wide variety of past and potential legal actions involving American museums over Nazi era works, and the fact-specific nature of the claims, one can understand — if not necessarily agree with — the AAM's reluctance to play a more active role.

— NICHOLAS DIETZ
IFAR Legal Associate

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4 As quoted by Alexander Forbes, "American Association of Museums Goes Easy on Nazi Loot," *ArtNet News* (www.news.artnet.com), Nov. 13, 2014.

5 In their statements, both Reynolds and the WJRO incorrectly refer to the AAM's "Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era" as its "Code of Ethics."

6 Forbes, *op cit.*

7 WJRO Press Release, "WJRO Calls on U.S. Museum Accreditation Group To Clarify Position on Nazi-Looted Art Cases," Nov. 11, 2014.

8 AAM Press Release, "Statement from AAM President Ford W. Bell on the current issue surrounding the Fred R. Jones Museum of Art at Oklahoma University," Nov. 17, 2014.

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DOES A RECENT MASSACHUSETTS CONSIGNMENT CASE SUGGEST A TREND?

CONSIGNORS ACROSS JURISDICTIONS GAIN LEGAL PROTECTION AGAINST INSOLVENT GALLERIES

While art galleries and consignors have traditionally transacted on the basis of mutual trust – the proverbial handshake, several recent high profile scandals involving once-reputable galleries have spurred state legislatures to provide consignors with protection when that trust is violated. In New York we only have to think of the Salander-O'Reilly and the Berry-Hill Galleries, which filed for bankruptcy in 2007 and 2005, respectively, and used consigned artworks as well as money owed to consignors to pay off their creditors. A September 2014 ruling in Massachusetts, *Plumb v. Casey*, suggests that other jurisdictions, along with New York, are also beginning to give consignors a stronger legal foothold against galleries that declare insolvency in the midst of unfinished business.

The Salander-O'Reilly case showed the extent to which galleries could potentially mishandle the consignor-consignee relationship. The Salander-O'Reilly Galleries, established in 1976, filed for bankruptcy more than thirty years later, at which point it owed millions of dollars to consignors. While the bankruptcy proceedings took place in 2007, the gallery's financial and legal tangle continued for years afterward. Plaintiffs, ranging from museums to private collectors, struggled to recover their portions of proceeds from consignment sales, and many attempted to re-claim the actual artworks. In 2010, gallery owner Lawrence Salander admitted to selling works owned by others and to using the proceeds as his own money. He also conceded to having engaged in other duplicitous business practices, pleading guilty to larceny and fraud. Although Salander was sentenced to prison, ordered to pay his debts, and some consignors did recover at least portions of their rightful claims, many were unable to collect.

The Berry-Hill Galleries were found to have conducted similar kinds of business dealings when they filed for bankruptcy in 2005. Although the gallery resumed operations in 2007, it faced, as did the Salander-O'Reilly Galleries, years of litigation initiated by owners of artworks to whom Berry-Hill owed sales proceeds and to those whose works remained unsold at the time of the gallery's insolvency. Under bankruptcy laws, the consigned items, unless protected by a UCC1 filing by the consignor, were combined with other gallery assets to pay off creditors. As with the Salander-O'Reilly case, recovery for plaintiffs has been limited.

In light of these abuses, the New York State Legislature took action; in 2012, it amended the state's Arts and Cultural Affairs Law, rendering it a misdemeanor for an art merchant to use artworks or money owed to consignors from sales of artworks as their own property. As of November 2012, when the amendment was passed, violation is punishable with fines and/or imprisonment, and consignor-claimants may obtain damages as well as injunctive relief against galleries that merge consigned works into their estates as part of bankruptcy proceedings.[1]

Now, a concurrent story in Massachusetts suggests the prevalence

1 See "In Brief: Changes to New York Arts and Cultural Affairs Law," *IFAR Journal*, Vol. 13, no. 4, 2012/2013, p. 13.

of galleries using consigned artwork and sales proceeds as part of their own holdings, as well as the emergence of an analogous line of legislative reasoning; namely, that consignors need more legal protection against such practices. The Massachusetts corollary to New York's legislative action came in 2006, after two major galleries declared bankruptcy. The State Legislature revised Massachusetts General Law (M.G.L.) Chapter 104A, the Massachusetts Fine Art Consignment Statute, so that, according to the newly-added §2(b), "A consignor who delivers a work of fine art … shall, upon delivery, … furnish to the consignee a separate written statement of delivery."[2]

Plumb v. Casey, a lawsuit commenced in federal district court and decided in 2014 in the Supreme Judicial Court of Massachusetts, was the testing ground for this amendment and ultimately favored the consignors, while reigning in the business dealings of a gallery. At issue was whether a "consignor" under the statute was *required* by §2(b) to submit a written statement of delivery in order to establish a consignment agreement, and, consequently, whether artists who, in the absence of such written statements, had understood their works to have been "consigned" could re-claim their works in the event of the gallery's insolvency. The holding, which did not bar the artist-consignors from recovery based on §2(b), broadly construed the categories of "consignment" and "consignor" to the benefit of the artists.

The background facts of *Plumb* are substantially similar to those surrounding the Salander-O'Reilly downfall. Kenneth Wynne III and Allyson Wynne owned and operated an art gallery in Massachusetts. Between 2003 and 2012, the gallery took on consignments from artists, agreeing to sell the artists' works in exchange for a commission amounting to half of the proceeds. Rather than issue written statements of delivery, the artist-consignors emailed the gallery specific information regarding each piece of artwork in compliance with Chapter 104A, §2(b).

In February 2013, the Wynnes filed for personal bankruptcy in the United States Bankruptcy Court for the District of Massachusetts, appointing Debora Casey as their bankruptcy trustee. At this time, the number of consigned artworks in the Wynnes' possession totaled around 84 pieces, and the combined value of the consigned art reached approximately $900,000.

Two months later in the same court, Casey moved to sell the consigned art held by the Wynnes. In May 2013, Eve Plumb, Robert and Dylan Stark, and eleven other artists joined forces against Casey. Unlike many of the consignors who had filed suit against Salander-O'Reilly and Berry-Hill, the claimants here were all artists who had created the works that they had entrusted to the Wynnes, and who thus had a personal as well as financial interest in the art.

"Because the artists had not provided written statements of delivery, she asserted that they were merely "unsecured creditors" whose only remedy was to file for claims against the bankruptcy estate."

About to lose ownership of the work that they had produced, the thirteen artist-claimants moved to enjoin the sale of their works, seeking a declaratory judgment establishing them as "consignors" under M.G.L. Chapter 104A. The claimants argued that the disputed paintings were held in trust and were not the property of the Wynnes' estates. They also sought a preliminary injunction restraining Casey from disposing of the art and a permanent injunction ordering

2 *Plumb v. Casey*, 469 Mass. 593 (2014).

the Wynnes to return the works along with any proceeds.

"Ultimately, the court reasoned that the purpose of §2b, which had been adopted in 2006 in the context of gallery insolvencies, was to protect artists rather than dealers."

Casey counterclaimed for declaratory judgment giving the Wynnes title to the artworks, arguing that the artists had been required to provide a written statement of delivery in order to be considered consignors entitled to retain ownership of the consigned art in the event of insolvency. Because the artists had not provided written statements of delivery, she asserted that they were merely "unsecured creditors" whose only remedy was to file for claims against the bankruptcy estate.

In July 2013, the artists filed a motion to certify a question of law to the Supreme Judicial Court of Massachusetts. In the absence of controlling precedent, the Bankruptcy Court granted the motion and called upon the Supreme Judicial Court to interpret the consignment statute.

In September 2014, the Supreme Judicial Court of Massachusetts ruled for the plaintiff artist-consignors, reasoning that although M.G.L. Chapter 104A §2b states that consignors "shall" accompany the delivery of a consigned work with a written statement providing information about the work, such written statement should not be construed as a required prerequisite for the formation of a consignment. The court concluded that pursuant to §2a, the delivery of an artwork by a consignor and acceptance of the work by consignee was enough to create a consignment. Ultimately, the court reasoned that the purpose of §2b, which had been adopted in 2006 in the context of gallery insolvencies, was to protect artists rather than dealers.

Plumb v. Casey suggests that the art world may be finding itself in a period of transition where the legal framework is being reconfigured to protect the owners of artworks who entrust their property to galleries. In light of the parallel series of events in New York and given the existence of lingering, unresolved claims against galleries such as Salander-O'Reilly, New York consignors today likely possess a different level of clout than their predecessors who filed suit against such galleries prior to 2012. This, however, should not dissuade them from filing a UCC1 when consigning or lending their works.

— K.J.C.

• • •

ERRATUM

Re: "Twitter Photos Protected by Copyright: AFP and Getty Ordered to Pay $1.2 Million," *IFAR Journal*, Vol. 15, no. 2, pp. 5-9:

IFAR incorrectly reported that the photographer Daniel Morel was awarded $400,000 in damages for the DMCA claim. The correct amount was $20,000. The $1.2 million that we reported was awarded for his infringement claim *is* correct.

SWISS MUSEUM ACCEPTS GURLITT TROVE AND PUBLISHES IMAGES

GERMANY WILL FOOT THE BILLS; NEW CLAIMANTS STEP FORWARD

The Kunstmuseum Bern took its time in deciding whether to accept the enormous art collection unexpectedly bequeathed to it by Cornelius Gurlitt, the elderly recluse who died in May 2014 in the midst of a government investigation into the collection. But ever since the Swiss museum announced its decision on November 24 to accept the collection, it has moved rapidly to show that it intends to bring transparency and legitimacy to the transfer process. So far, it is getting high marks, even from formerly vocal opponents of the German government's handling of the situation or the museum's acceptance of the bequest.[1] At least one new looted work has been identified as a result of the museum's actions.

As was extensively discussed in a previous *IFAR Journal*,[2] the collection, originally amassed by Cornelius' deceased father, Hildebrand, and hidden from public view for more than sixty years, burst into public consciousness in November 2013, after a German magazine *Focus* revealed that, in the course of an investigation into tax evasion the previous year, the German government had found more than 1200 artworks hidden in Gurlitt's Munich apartment. In 2014, other works were found in Gurlitt's house in Salzburg, although very little information was released about them. One of the biggest revelations stemming from the Bern museum's decision is the enormity and quality of Gurlitt's Salzburg collection (see below).

"One of the biggest revelations stemming from the Bern museum's decision is the enormity and quality of Gurlitt's Salzburg collection."

Some of the Gurlitt works, although the exact number is still not known, were looted from Jewish collections during the Nazi era. After an initial outcry over the German government's lack of transparency regarding the art trove, suspect works (eventually numbering 458) were posted on a government website in early 2014. Most were poorly illustrated and none of them were from the Salzburg group. An international Task Force was then set up to undertake painstaking provenance research into the collection. As of the November 24 agreement, only two works had been officially determined by the Task Force to have been looted (paintings by Henri Matisse and Max Liebermann **(FIGS. 1** and **2)**)but,

FIGURE 1. HENRI MATISSE. *Seated Woman,* 1921. **Oil on canvas. Discovered in the Gurlitt Collection; formerly in the Paul Rosenberg Collection; and soon to be returned to his heirs. Shown in the temporary stretcher being used to stabilize the painting. Photo: Courtesy of Art Recovery International.**

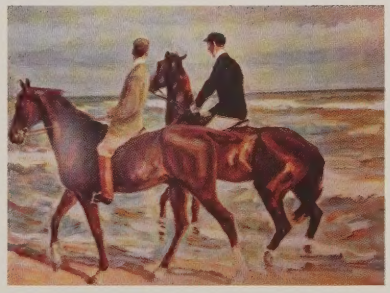


FIGURE 2. MAX LIEBERMANN. *Two Riders on the Beach,* 1901. **Oil on canvas. Discovered in the Gurlitt Collection and expected to be returned to the heir of David Friedmann.**

1 For example, Ronald Lauder, President of the World Jewish Congress, who warned that there would be "an avalanche of lawsuits" if the Swiss museum accepted the bequest now believes that it was a good decision. See his interview with Nalan Sipar in *Deutsche Welle,* November 27, 2014.

2 Sharon Flescher and Michele Wijegoonaratna, "The Tangled Web of a Munich Art Trove," *IFAR Journal,* Vols. 14/4 and 15/1, 2004, pp. 3-14.

as *IFAR Journal* goes to press, neither has been restituted.

Many works from the Gurlitt Collection were so-called "degenerate" artworks – primarily by modern artists derided by Hitler – that had been removed from German public collections under the Nazis. Hildebrand Gurlitt, a former museum curator and an art dealer who worked for the Nazis, was a champion of modern art. The removal of the degenerate works from German public collections is considered to have been "legal," and the deaccessioned works are not subject to ownership claims. Nonetheless, they have been specifically addressed by the Bern museum in accepting the collection.

The November 24 announcement was sealed by a formal agreement between the museum, the German Federal Government and the Free State of Bavaria affirming that:

- No looted works will enter the museum's collection
- The research Task Force set up by the Federal Government in Germany will continue to investigate suspect works
- Artworks with questionable provenance will remain in Germany until research shows that they were not looted.
- The German government will continue to pay the costs and also have responsibility for returning looted works to their rightful owners
- Once the Bern museum accepts a work for its collection, however, the responsibility regarding future claims will shift to it. The same will apply in 2020, if, in the absence of a negative report by the Task Force or a claimant stepping forward, the museum accepts the work.
- The Kunstmuseum will relinquish any claim on works from the collection that it has not accepted by 2020.
- The museum will continue to do its own provenance research
- It will adhere to the Washington Principles in handling issues of looted art and will undertake its work with complete transparency
- Priority in loans from the Gurlitt bequest will be given to German museums wishing to borrow degenerate works removed from their collections.

TRANSPARENCY

The museum made good right away on its pledge of transparency. In a reversal of the German government's policy of posting only "suspect" works, on November 27, the museum posted a complete list on its website of all the works in the Gurlitt bequest, including, significantly, those found in Salzburg. The list includes color images and brief descriptions of the works. The list is long – 196 pages for the Munich collection and 95 pages (250 works) for the Salzburg component.

Further underscoring its promise of transparency, the museum announced on November 24 that, except where third party privacy issues dictated otherwise, all of Hildebrand Gurlitt's business ledgers and correspondence will be made available to researchers. They will be posted on the German government website, www.lostart.de, after experts verify that they are not in conflict with the rights of third parties. These records will be transferred to the German Federal Government.

As noted, the museum will continue to do its own research alongside that of the German-sponsored Task Force. Toward that end, the museum announced on November 27 the receipt of a seven-figure anonymous contribution from a donor, identified by the museum's president as a "local lady … and 'friend' of the institution," to help it establish a new research unit comprising two full-time provenance research and archivist positions dedicated to the Gurlitt Collection.[3]

[3] See Coline Milliard, "Private Donor Funds Kunstmuseum Bern's Gurlitt Research Unit," *Artnet News*, November 27, 2014, which cites the Swiss newspaper *Tages Anzeiger's* interview with the Kunstmuseum's president, Christoph Schäublin.

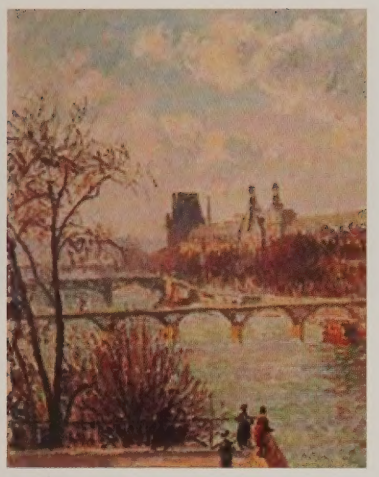


FIGURE 3. CAMILLE PISSARRO. *Paris Kathedrale,* **1902. Oil on canvas, 46.5 x 38.5 cm. #9 on the list of works found in Gurlitt's Salzburg home, and recognized as a probable match with the Pissarro painting in Figure 4.**

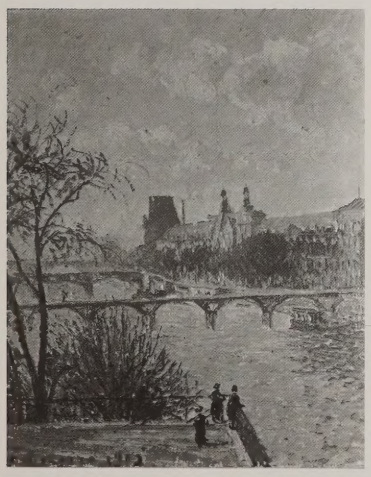


FIGURE 4A. CAMILLE PISSARRO. *Ansicht auf Paris* **(View of Paris), 1902. Oil on canvas, 47 x 38 cm. Shown in a photograph from when the work was stored by the ERR at the Jeu de Paume in Paris, 1942-45. The work was listed as having come from the collection of Mme. Max Heilbronn, Paris.**

It didn't take long for the posting of the Gurlitt works to yield results. Almost immediately, the museum announced that one work –a 1902 Camille Pissarro painting **(FIG. 3)** – from Gurlitt's Salzburg collection was identified as a likely match with a looted work from the Mme. Max Heilbronn Collection in Paris. Although the match appears to have been brought to the museum's attention by several people,[4] the museum's director, Matthias Fehner, said that the apparent match was also obvious to the museum. Compare **FIGURE 3,** the Pissarro entitled "Paris Kathedrale," 1902, the Gurlitt work posted on the museum's website, with **FIGURE 4A,** the work entitled "Ansicht auf Paris" (View of Paris) listed on the Einsatzstab Reichsleiter Rosenberg (ERR) record card **(FIG. 4B)** of looted works stored in the Jeu de Paume during the war.

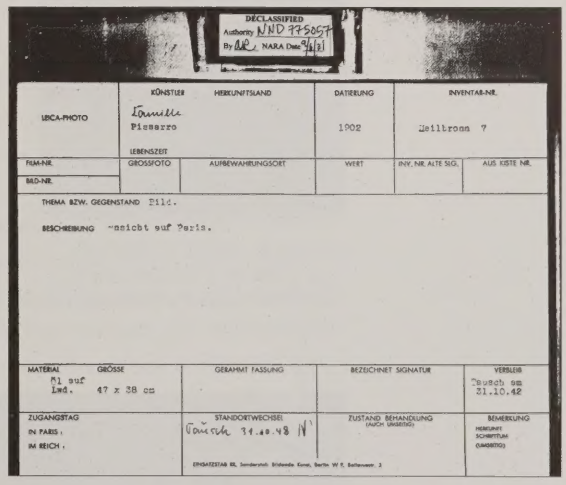
The Pissarro is not the only possible "match" with looted work. On December 4, in Berlin, the head of the research Task Force, Ingeborg Berggreen-Merkel, stated that there have thus far been more than 200 inquiries from

"It didn't take long for the posting of the Gurlitt works to yield results. Almost immediately, the museum announced that one work — a 1902 Camille Pissarro painting from Gurlitt's Salzburg collection — was identified as a likely match with a looted work ..."

possible claimants about specific works in the Gurlitt Collection.

THE SALZBURG REVELATION

The release of information about Gurlitt's Salzburg collection came as a revelation to many people. While admittedly uneven, the quality is often outstanding, which, with the exception of the Matisse and Liebermann paint-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Authority NND 773057
By DR, NARA Date 9/6/21

LBCA-PHOTO

KÜNSTLER: Camille Pissarro
HERKUNFTSLAND:
LEBENSZEIT:
DATIERUNG: 1902
INVENTAR-NR.: Heilbronn 7

FILM-NR.
BILD-NR.
GROSSFOTO
AUFBEWAHRUNGSORT
WERT
INV. NR. ALTE SLG.
AUS KISTE NR.

THEMA BZW. GEGENSTAND: Bild.

BESCHREIBUNG: "nsicht auf Paris.

MATERIAL: Öl auf Lwd.
GRÖSSE: 47 x 38 cm
GERAHMT FASSUNG
BEZEICHNET SIGNATUR
VERSILBE: Deutsch am 21.10.42

ZUGANGSTAG
IN PARIS:
IM REICH:
STANDORTWECHSEL: Tausch 31.10.43 N
ZUSTAND BEHANDLUNG (AUCH UNGÜLTIG)
BEMERKUNG (HERKUNFT SCHRIFTUM UNGÜLTIG)

EINSATZSTAB RR, Sonderstab Bildende Kunst, Berlin W 9, Bellevuestr. 3

FIGURE 4B. ERR Inventory Card for the Heilbronn Pissarro.

4 The German Press Agency (DPA) reported on November 27th that WWII-era researcher Willi Korte brought this "match" to the attention of authorities. But another researcher, Marc Masurovsky, told IFAR that he made contact as "overseer of the ERR Database, which is funded by the Claims Conference," and that he notified the attorney representing the family (Heilbronn heirs).

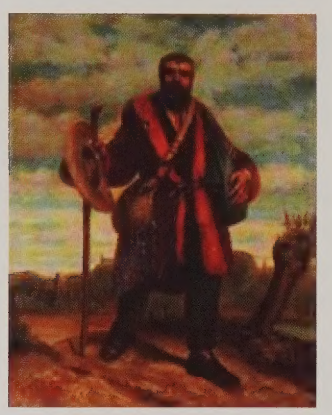

FIGURE 5. GUSTAVE COURBET, *Shepherd (Shäfer).* **Oil on canvas, signed lower left "G. Courbet". Found in Gurlitt's Salzburg home.**

FIGURE 6. AUGUSTE RENOIR. *Two Women,* **Pastel on paper. Found in Gurlitt's Salzburg home.**

FIGURE 7. EDOUARD MANET. *Seascape.* **Oil on canvas. Found in Gurlitt's Salzburg home.**

ings **(FIGS. 1** and **2)** and a few other works, cannot be said of the Munich trove. And the range is surprising. Although classical modern works from the late 19th and 20th century predominate, the 18th century is also represented, by Guardi and Hubert Robert, for example. There are multiple works by several artists, including at least 5 paintings by Courbet **(FIG.5)** and several by Renoir **(FIG. 6).**

Given their more than 60-year absence from public view, the rediscovery of these works may have art historical significance as well as value to claimants. Manet's lovely *Seascape,* which is undated on the museum's site but most likely dates to the mid 1860s **(FIG. 7),** would surely have been welcome at the Philadelphia Museum's 2004 exhibition on "Manet and the Sea." It is not in the 1975 Manet catalogue raisonné. Monet is represented by one of his series of *Waterloo Bridge* **(FIG. 8),** a work apparently found in a suitcase left by Gurlitt in the hospital just before he died. It would be interesting to juxtapose this painting, which appears to

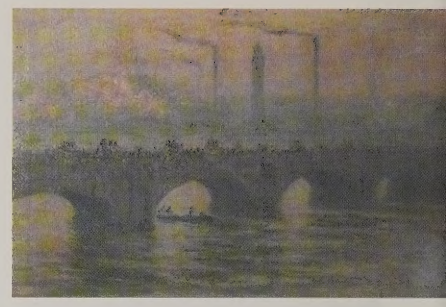

FIGURE 8. CLAUDE MONET. *Waterloo Bridge,* **1903. Oil on canvas. Found in a suitcase Gurlitt left in the hospital. Posted with Gurlitt's Salzburg collection.**

FIGURE 9. PABLO PICASSO. *Still Life with Fruit.* **Watercolor on paper. Found in Gurlitt's Salzburg home.**

FIGURE 10. PAUL CÉZANNE. *Mont. Sainte-Victoire,* 1897. **Oil on canvas. Discovered in Gurlitt's Salzburg home.**

be #1562, listed as "whereabouts unknown," in the 1996 Monet catalogue raisonné, with others from the series that Monet worked on from c. 1899-1903. There is also a delicate Picasso watercolor *Still Life* **(FIG. 9)**.

Certainly one of the most valuable works is a Cézanne oil painting of his iconic subject, *La Montagne Sainte-Victoire,* which dates to 1897 **(FIG. 10)**. The work is unstretched and attached to plywood, and is said to be in poor condition. This work was well known to specialists before WWII, having been lent to several exhibitions in the late 1930s, when it was owned by the artist's son. It was included in the 1996 Cézanne catalogue raisonné (as #796), where it was illustrated with an old black and white photo and had an incorrect provenance after the ownership of Paul Cézanne *fils*. The provenance has just been updated in the new online catalogue raisonné of the *Paintings of Paul*

FIGURE 11. GEORGES SEURAT. ***Woman/ Figure.*** **Conté crayon on paper. Found in Gurlitt's Salzburg home.**

Cézanne (as #314-TA), which was launched in November 2014, to indicate that the painting is in the "Gurlitt Estate, Salzburg (1914)". It is not known at this point how or when the work transferred from Cézanne's son, who apparently owned it at least as late as 1940, to Hildebrand Gurlitt.[5]

[5] Jayne Warman, co-director of the online Cézanne catalogue raisonné, told IFAR that the authors of the catalogue were unaware of the location of the painting until they were informed by authorities in Europe, and that they were told it was in poor condition.

FIGURE 12. EDGAR DEGAS, ***Three Dancers.*** **Pastel on paper. Found in Gurlitt's Salzburg home.**

There are beautiful drawings and pastels as well, including a conté crayon by Seurat **(FIG. 11)** and a pastel of *Dancers* by Degas **(FIG. 12)**. Even as seen in the small images posted on the museum's website, the works are intriguing. No doubt it will be a blockbuster exhibition when they are put on view at the museum. Current intentions are to show the works temporarily as a collection, and then integrate them into the museum's permanent collection. Exactly when that will take place will depend on how quickly the provenance research can be completed. As the Kunstmuseum has firmly said, no work will enter its collection until it is proved to be free of the taint of Nazi loot.

— S.F.

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BUYER BEWARE: IS THERE A DUTY TO AUTHENTICATE ART?

STEVEN R. SCHINDLER AND KATHERINE WILSON-MILNE*

"A recent decision in federal court in New York … provides a useful opportunity to review the law regarding a purchaser's duty to authenticate fine art prior to purchase."

Until recently, purchasers of fine art could reasonably assume they were under no legal obligation to authenticate prospective purchases prior to sale. They could simply inspect the work, rely on the seller's representations and, if all seemed in order, move forward with the transaction. If the work later turned out to be a fake, the purchaser could, within the statute of limitations, assert claims against the seller for a return of the purchase price. A recent decision in federal court in New York, however, calls these assumptions into question, and provides a useful opportunity to review the law regarding a purchaser's duty to authenticate fine art prior to purchase.

FIGURE 1. *Summer Table,* which was sold in 2007 as a Milton Avery painting and was later determined to be a fake.

THE KINNEY DECISION

In the recent case, *ACA Galleries, Inc. v. Kinney,*[1] Judge Miriam Cedarbaum, dismissed an art gallery's claims for fraud and mutual mistake surrounding its purchase of a forged work of art, ruling that it should have obtained an expert opinion as to the painting's authenticity *prior* to purchase. Because it did not, according to Judge Cedarbaum, the art gallery could not base its lawsuit for fraud and mutual mistake upon the subsequent discovery that the painting was a fake. The Second Circuit agreed, affirming Judge Cedarbaum's holding and general reasoning on appeal.

The facts were as follows. In 2007, Defendant Joseph Kinney contacted ACA Galleries ("ACA") about a Milton Avery oil painting entitled *Summer Table* that had become available for sale **(FIG. 1).** After negotiation, Kinney shipped the painting from North Carolina to a warehouse in New York for inspection. Jeffrey Bergen, the president and COO of ACA, inspected the painting in New York and then agreed to purchase the painting from Kinney for $200,000. Shortly after the transaction was completed, ACA arranged for the painting to be examined by the Milton and Sally Avery Arts Foundation (the "Avery Foundation"). The Avery Foundation determined the painting to be a fake. ACA informed Kinney of this determination; Kinney failed to refund the purchase price; and the lawsuit followed.

Unknowing purchasers of forged art works have a variety of legal claims they may pursue against the sellers of such works, including actions for fraud and mutual mistake, and breach of express and

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1 ACA *Galleries, Inc. v. Kinney,* 928 F. Supp. 2d 699 (S.D.N.Y. 2013), *aff'd,* 552 Fed. Appx. 24 (2d Cir. 2014).

implied warranties under Article 2 of the Uniform Commercial Code (UCC). Judge Cedarbaum, interestingly, made no reference to the UCC, engaged in no specific discussion of the sale of art works, and did not rely on anything other than the most general descriptions of fraud and mutual mistake. Save one easily distinguishable case, Judge Cedarbaum relied on no art cases and placed no factual weight on the nature of the transaction as the sale of a work of fine art. Rather, the court relied on cases involving credit default swap transactions between highly sophisticated commercial entities, where the agreement or documents themselves prohibited plaintiffs from relying on the defendant, or on real property cases that discussed the duty to inspect the contemplated space to see whether it was occupied.

"In ... *ACA Galleries, Inc. v. Kinney,* Judge Miriam Cedarbaum dismissed an art gallery's claims for fraud and mutual mistake surrounding its purchase of a forged work of art, ruling that it should have obtained an expert opinion as to the painting's authenticity prior to purchase."

DILIGENCE REQUIREMENTS APPLIED TO ART TRANSACTIONS

New York's law of mutual mistake – where both parties share "the same erroneous belief as to a material fact, and their acts [do] not in fact accomplish their mutual intent"[2] – actually imposes no duty on a merchant buyer (or any buyer) to authenticate a work of art, or engage in any extraordinary diligence, prior to sale. Two leading art cases prior to *ACA v. Kinney* grappled with similar facts surrounding actions for rescission of the sale of art in circumstances of mutual mistake and fraud, and, while coming to different conclusions, they both diverge significantly from the reasoning contained in *ACA v. Kinney.*

FIGURE 2. A drawing sold as a Matisse and later determined to be a fake, which factored into a 1992 legal decision.

In *Richard L. Feigen & Co. v. Weil,*[3] the New York Supreme Court in 1992 found that the plaintiff art gallery was entitled to a return of the purchase price paid to the defendant seller of a fake Henri Matisse drawing **(FIG. 2),** based on a finding of mutual mistake as to the drawing's authorship. The court stressed the reasonableness of the mutual mistake based on the plaintiff's proper inspection of the work, rational assessment of the source and style of the work, and the seller's reputation. In doing so, the court rejected the defendant's argument that "it is bad faith and unreasonable business behavior whenever art dealers ... fail to authenticate artwork," making clear in its ruling that the buyer had no legal obligation to perform a detailed or more than cursory examination into authenticity despite the fact that, as in *ACA v. Kinney,* the buyer could have done so, and was an art merchant with experience in the field:

> [T]here is no authority for the proposition, as argued here, that in a contract between an expert and non-expert, rescission based on mutual mistake is unavailable to the expert. ...
>
> In claiming that plaintiff has more expertise, Weil implies that it had a duty to authenticate the drawing ... Under New York law, art dealers, when acting as sellers, may obtain and provide certificates of authenticity ...

2 *ACA Galleries, Inc. v. Kinney,* 928 F. Supp. 2d at 701 (quoting *Allen v. WestPoint-Pepperell, Inc.,* 945 F.2d 40, 46 (2d Cir. 1991)).

3 *Richard L. Feigen & Co. v. Weil,* no. 13935/90 (N.Y. Sup. Ct. N.Y. Cnty Feb. 18, 1992).

> but they are not required to do so. ... Even if this Court believed that such 'due diligence' requirement on art dealers was necessary to protect sellers and buyers, such a change in the art law should be best left to the legislature. ...
>
> Feigen & Co.'s acceptance of the drawing as a Matisse was based on its rational assessment of the source and style of work ... Feigen & Co. *was not asked to nor did it have any substantive or legal obligation to go beyond a 'cursory inquiry' as to its authenticity.*[4]

In an even earlier case, *Porter v. Wertz, et al.,*[5] Samuel Porter, the owner of a painting by Maurice Utrillo entitled *Château de Lion-Sur-Mer,* sought to recover the painting, or its value, from parties who participated in a series of transactions that resulted in the painting being shipped to Venezuela. The Appellate Division in New York held that two subsequent purchasers of the Utrillo painting could not claim to be acting in good faith under the UCC, or meet the requirements for a defense of statutory[6] or equitable[7] estoppel, because the seller had not been a qualified merchant and defendants could not be said to be acting in good faith.[8]

The facts are confusing. Plaintiff Porter and a man presenting himself by the name of Wertz, but whose real name was Von Maker, had a pre-existing business relationship. Von Maker told Porter he was considering buying the Utrillo and Porter then lent Von Maker the painting while Von Maker supposedly considered its purchase. A few months later, however, Porter was unable to find Von Maker or the painting. Porter then discovered that Von Maker was a seasoned criminal and sought to negotiate either a return or the actual sale of the painting with Von Maker's lawyer. In the meantime, unbeknownst to Porter, Von Maker had enlisted his friend (the *real* Peter Wertz, who was actually a delicatessen employee and not an art dealer) as an intermediary to sell the Utrillo painting to the defendant Feigen Gallery (the same Feigen Gallery that, coincidentally, was the plaintiff in the case described above).

Feigen subsequently sold the painting to another gallery, who arranged a sale to a party in Venezuela. Unsuccessful in his entreaties to Von Maker's lawyer, Porter sued Von Maker, Feigen, and others, including the gallery to whom Feigen sold the work, in New York State court. In response to Porter's lawsuit, Feigen asserted that he had been a good faith purchaser and, thus, the affirmative defenses of statutory and equitable estoppel applied. While the elements of these defenses are complicated and this case focused on different facts and legal issues than *Feigen v. Weil* and *ACA v. Kinney,* the relevant aspect of the *Porter v. Wertz* court's reasoning rejecting these defenses was that the Feigen Gallery defendants had failed to inquire into the real ownership of the painting at issue where there were *overtly* suspicious circumstances around the sale and also the identity of the seller (the real Wertz was not an art dealer, nor did he hold himself out to be). While holding the purchaser to some modicum of reasonable inquiry, the case did *not,* as the *Feigen v. Weil* court later confirmed in discussing *Porter v. Wertz,* foreclose a claim of mutual mistake based on a finding that the purchaser had failed to authenticate an art work. Instead, the case discussed overt red flags as to the nature of the transaction itself, which the purchasers ignored. Despite the different legal

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4 *Id.* at 11-12 (emphasis added).

5 *Porter v. Wertz, et al.,* 23 U.C.C. Rep. Serv. 614 (N.Y. Sup. Ct. March 13, 1978), *rev'd and vacated,* 68 A.D.2d 141 (1979), *aff'd,* 53 N.Y.2d 696 (1981).

6 Section 2-403 of the Uniform Commercial Code, subsection (2) describes statutory estoppel (often referred to as "entrustment") as "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business." Subsection (9) of section 1-201 of the Uniform Commercial Code defines a "buyer in the ordinary course of business" as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind."

7 As the *Porter* court stated: "Equitable estoppel or estoppel in pais is the principle by which a party is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed." *Porter v. Wertz,* 68 A.D. 2d at 147 (*quoting* 21 N.Y. Jur., Estoppel, § 15).

8 This decision was later affirmed by New York's highest court.

FIGURE 3. *Lydia Reclining on a Divan* was sold as a Mary Cassatt but was later determined to be a fake.

postures of these two cases, reading them together presents a coherent legal rule: that where no overtly suspicious circumstances surround the sale of a work of fine art, a purchaser, sophisticated or not, has no further duty to investigate beyond a reasonable inspection.

THE *KINNEY* COURT MISAPPLIED *FOXLEY V. SOTHEBY'S*

In an equally inapplicable decision, *Foxley v. Sotheby's Inc.*, and the only art case relied on by Judge Cedarbaum, a federal court in 1995 dismissed plaintiff purchaser William Foxley's claims against Sotheby's for fraud and return of the purchase price paid for a painting believed to be by Mary Cassatt but later shown to be fake **(FIG. 3).** The court held that Foxley had failed to show justifiable reliance on any representations made by defendant Sotheby's about the authenticity of the painting, specifically the statement by Sotheby's that the painting was accompanied at sale by a letter from the noted Cassatt expert, Adelyn Dohme Breeskin, "discussing" the painting. Foxley, although acknowledging that Sotheby's had made an explicit statement about the existence of the Breeskin letter prior to sale, did not ask to see the letter until many years later when he was alerted that the painting was not in fact authentic. Only at that point did Foxley realize that, in discussing the painting, the letter did not represent it was authentic.[9] As the court noted, Sotheby's had not in fact represented to plaintiff that the letter discussed authenticity, despite plaintiff's assumption that it had. The facts and holding of *Foxley v. Sotheby's Inc.* plainly do not support a requirement that art purchasers commission an authenticity study prior to sale. To the contrary, the *Foxley v. Sotheby's Inc.* court dismissed a fraud claim based on the fact that a letter actually existed, that it had been generated and offered to plaintiff by defendants *prior* to sale, and that plaintiff was aware of, but failed to request, this letter.[10] In other words, the plaintiff could not have justifiably relied on a letter he had not asked to read.

AUTHENTICITY AND THE UNIFORM COMMERCIAL CODE

Authenticity disputes are frequently analyzed under the warranty provisions of the UCC. Under Article 2 of the UCC, a seller of art is held to certain express and implied warranties. Descriptions of the work of art, including those involving provenance and authenticity, give rise to an express warranty where such description forms the basis of the bargain.[11] Implied warranties of merchantability and proper usage for a particular trade apply to goods sold by a merchant and require that goods pass under the description provided in the terms

9 *Foxley v. Sotheby's Inc.*, 893 F. Supp. 1224, 1228 (S.D.N.Y. 1995) ("The critical allegation that is absent from the complaint is that Sotheby's falsely represented that it would deliver a copy of the Breeskin letter together with the painting.").

10 In *ACA v. Kinney,* there was no opinion regarding authenticity provided, offered or available to plaintiff prior to sale or one that existed at all until plaintiff, of its own initiative, requested one from the Avery Foundation. ACA did not fail to ask for known information relevant to the terms of the sale and authenticity of the painting. ACA, in fact, did all that case law suggests it should have done — make a reasonable inspection of the painting and remain alert to red flags. Judge Cedarbaum, notably, did not base her opinion on the existence of particular red flags arising from defendant's conduct.

11 In addition, the New York Arts and Cultural Affairs Law Art. § 13.01 creates an express warranty of authenticity when an art merchant selling to a non-merchant provides a written statement of authenticity as part of the sale. This sort of warranty, however, would not be applicable to ACA Galleries in the recent case because it is a merchant buyer.

of sale and be reasonably fit for the ordinary uses typical for such goods.[12] The authenticity of a work of art, for example, falls under the express and implied warranties. In contrast to fraud, neither the seller's knowledge of limitations on merchantability nor the buyer's reasonable reliance on any such representations are necessary elements for a breach of implied warranty claim. A buyer may, however, through his or her actions intentionally or unintentionally lose the benefit of these implied warranties. If the flaw or defect is detectible upon reasonable inspection prior to sale, for example, implied warranties are not available to the purchaser. As one leading commentary has summarized:

> Whether the buyer's examination of the goods results in the exclusion of the warranties depends on the buyer's sophistication, the normal method of examining goods in the circumstances, and the obviousness of the defect. If a flaw is discernible on visible inspection before purchase, the implied warranties are excluded. *If, however, a defect in forged artwork can be detected only by scientific investigation or extensive research, a buyer's inspection should not ordinarily result in an exclusion of the implied warranties.*[13]

Under a warranty analysis of *ACA v. Kinney,* Kinney would most likely be liable to ACA for the purchase price of the painting, because ACA had conducted an inspection and could not detect without seeking an expert opinion that the painting was not authentic. ACA was entitled to rely on the implied warranties of merchantability and ordinary usage in its dealings with Kinney. Implied warranty claims would have been timely, as the statute of limitations for warranty claims is four years, and ACA's cause of action accrued less than three years before the complaint was filed in July of 2008. The court did not, however, address these claims, nor were they clearly pleaded and briefed by plaintiff's counsel.

Even under its own reasoning, however, the *ACA v. Kinney* court failed to address the essential question of what ordinary diligence means for a purchaser *in the art world.* To assess reasonable reliance or negligence in any duty to inspect context, the court was required to assess what a sophisticated purchaser in the art trade would be expected to do. If the court had done a review of art market conduct and expectations along with cases discussing these particular transactions, the decision likely would have been quite different. But the court failed to look at these cases or to conduct fact finding on the real life practices of art dealers, galleries, sellers and purchasers. Nor did the court provide clear guidance on what lengths it expects sophisticated purchasers of art to go to in conducting appropriate due diligence. Must every non-layman purchaser solicit a professional authenticity review before a purchase and at any cost? Is this even feasible given an increasing reticence on the part of artists' foundations and individual experts to publicly authenticate works of art for fear of being sued?

"Must every non-layman purchaser solicit a professional authenticity review before a purchase and at any cost? Is this even feasible ...?

Although the outcome in *Kinney* may be viewed as a fact-specific application of non-UCC and non-warranty law, art purchasers should read this case as one of many indicators that pre-sale investigation is advisable. The facts surrounding a sale, such as good faith, notice, representation, and a duty to investigate are subjective factors that a court will examine in analyzing whether rescission or damages should be awarded. *Kinney* is also a warning to litigants to hire experienced art lawyers. Art sales are not securities or real estate transactions, and there is a growing body of precedent in this area that lawyers and judges should consult.

• • •

12 The UCC language on implied warranties is more tailored to fungible, useful objects, but the language does not preclude applicability to fine arts.

13 Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists,* Vol. 1, p. 102 (4th ed., 2012) (emphasis added).

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3D PRINTING: INFINITE POSSIBILITIES AND NEW CHALLENGES FOR THE ART WORLD

An *IFAR Evening* — July 22, 2014

EDITOR'S NOTE:

3D printing is having an impact on many areas of our lives, from manufacturing and architecture to surgery and fashion. The visual arts are no exception. On July 22, 2014, at the Scandinavia House in New York, IFAR assembled six distinguished speakers to explore the varied ways that 3D printing and other digital technologies are changing the art field. The program was spurred, in part, by a recent exhibition organized by the Museum of Arts and Design in New York that showcased a broad range of artworks created with the new technologies. The curator of that exhibition was one of the IFAR Evening *speakers. The subject was explored from many perspectives – that of the artist, museums, and the law, including patent and copyright infringement and forgery and fraud. The program was followed by a Q&A and a reception. Below is an edited version of the talks. This program was also videotaped,and the video can be found on IFAR's website: www.ifar.org.*

SPEAKERS IN SEQUENCE:

AARON MILRAD
Counsel, Dentons Canada, LLP

RONALD T. LABACO
Marcia Docter Curator,
Museum of Arts and Design, New York

BARRY X BALL
Sculptor

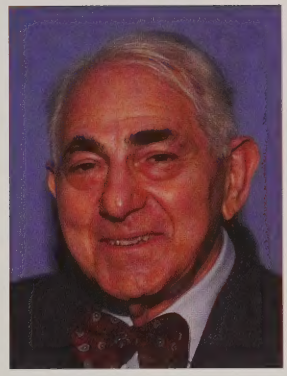
DON UNDEEN
Senior Manager, MediaLab,
The Metropolitan Museum of Art, New York

AXEL RÜGER
Director, Van Gogh Museum, Amsterdam

JAMES R. KLAIBER
Partner, Pryor Cashman, LLP

INTRODUCTORY REMARKS

AARON MILRAD*



About a year and a half ago, I heard the phrase 3D printing for the first time. I initially likened it to a computer printer, a piece of adjunct equipment rather than anything significant in itself.

But it wasn't.

About six months later, I heard about a young man in Austin, Texas by the name of Cody Wilson, who had 3D printed a working handgun undetectable by security devices, then uploaded instructions as to how to make the gun onto his website, available for all to see and copy. Every home now had the potential to become a gun factory.

The media of course got involved; the gun lobby got involved; and government representatives went on TV as to the legality or illegality of the project. A real conundrum.

3D printing was clearly more than just a potential hobbyist tool. It had significant applications and ramifications well beyond anything I had considered. But really good 3D printers at that time cost between $150,000 and $250,000 and had to be operated by specialists. So I put 3D printing away as unrealistic.

The penny dropped a few weeks later when I was working on a legal case involving fake artwork. It suddenly struck me: 3D printing, fake artwork, sculpture, decorative art, antiquities – was it possible that 3D printing could create these kinds of fake objects? Could you create something in bronze or brass, or silver, or gold on a 3D printer? Could you create the software necessary to produce fakes that were reasonably undetectable?

How would this affect appraisers and authentication experts? What would they have to watch out for and learn about? What about art dealers and auction houses being offered works that look pretty good? These fraudulent works could then be passed onto unsuspecting buyers. Could we now have a 3D fraudulent objects situation somewhat similar to the paintings made by the best fakers? Could you fool the experts? If so, the consequences for the art market could be deadly. Don Undeen, Senior Manager of the Media Lab at The Metropolitan Museum of Art, will, I hope, share his expertise in this area.

At an AXA Art Insurance board meeting, I raised the question of possible future fraudulent claims for lost, stolen or purchased art that turns out to have been made by a 3D printer rather than by the artist, or even for a fraud committed by an artist

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who perhaps created extra copies of works. How could we guard against it?

A new kind of risk had now to be considered in any claim for lost, damaged or missing art – is it real? It was not a popular thing to bring up.

"3D printing is ready to move forward as an alternate means of creating, equal to and even better than existing reproduction methods."

On the positive side, 3D printing could also be a boon to artists and museums. Exact copies could be made of fragile museum items when going on tour, so as not to risk damaging the original; one could substitute a copy for display when the original was on tour or out being restored. Museums could also make commercial use of 3D images of works in their collections. I expect Axel Rüger, Director of the Van Gogh Museum, will address this.

Artists could create objects and designs that were heretofore impossible, creating editions, for example, with a 3D printer that were absolutely perfect, one to the other, without having to worry about correcting works as they came out of the kiln or moulds or lost wax process. I read recently of an artist who has a commission requiring 500 tiles the same size and color who will be printing those on a 3D printer rather than utilizing the normal ceramics methods. Each tile will be a perfect replica of the prior one. Barry Ball, a sculptor experienced in this medium, will share his experiences with us.

In this 18-month period, from the time I first heard of 3D printing, better 3D machines have come out and also cheaper ones, which you can purchase for under $2,000. Even the high end machines are much reduced in price. There now are companies who have set up stores where you can use 3D machines with instructions given – they are in a 3D machine rental and instruction business.

I decided to write an article on 3D printing and the arts. Sharon Flescher said IFAR would be interested, and the article was published in the *IFAR Journal* (Vol. 14, no. 4/Vol. 15, no. 5).

Just a few months ago (October 16, 2013 – June 1, 2014), the Museum of Arts and Design in New York put on an exhibition called "Out of Hand: Materializing the Postdigital," exhibiting works of art that had been created by a 3D process. Works such as a tapestry by Chuck Close, sculptures by Frank Stella and Roxy Paine, pottery by Tim Knapen, as well as furniture, different kinds of original designed chairs, lamps, clothing by Michael Schmidt, knitting by Sandra Backlund, on and on, including even an example of a shopping center in Spain built by 3D printing. Even more amazing, when you entered the exhibition you could stand on a turntable with all the appropriate equipment to create a 3D sculpture of yourself, about 12 to 18 inches high, which, when completed, would be sent to you for $35 plus shipping. There were examples of 3D machines whose designs could be initiated by just speaking into the machine.

Ronald Labaco, Marcia Docter Curator, Museum of Arts and Design, will discuss this amazing exhibition.

3D printers can use different powders — different metals, fibers and even food. You may remember watching some of the original futuristic sci-fi movies, such as *Star Trek* or even *Buck Rogers,* where they used the 'Replicator" machines to get their meals. Imagine getting your future meals out of a replicator.

3D printing is ready to move forward as an alternate means of creating, equal to and even better than existing reproduction methods. It is being used now in industry, in medicine, dentistry, science, automobile manufacture, airplane manufacture and many other areas. Even politics and history.

For instance …

New equipment will allow for a dental crown to be made while in the dental chair. No longer does an impression have to be made and then sent to a laboratory. Now a small computer is inserted onto the tooth. It permits a 3D printer to make the crown while the patient waits and has it affixed at that

same appointment. Both reducing cost and a further appointment.

What remains to be seen will be the legal implications of people using 3D software and 3D-printed copies of existing items and possible issues with existing patents, trademarks and copyrights. This is an area that will be discussed by James Klaiber, Partner, Pryor Cashman LLP.

And to show the importance of 3D images …

President Barack Obama can add another milestone to his career, as he is the first sitting president to have been 3D scanned and printed. The Smithsonian debuted a bust and a life mask of Obama at the first Whitehouse Maker Faire on June 18 **(FIG. 1).** That sculpture will join the National Portrait Gallery's collection, along with its plaster life masks of Abraham Lincoln and George Washington.

FIGURE 1. 3D-scanned and printed bust of President Barack Obama.

FIGURE 2. Chocolate Obama Scented Soap Head.

I understand the process of scanning the President was done in two parts by Vincent Rossi, who is a Smithsonian 3D program officer. It is described on the Smithsonian website as, "We 3D-scanned the face, ear to ear, at extremely high resolution, capturing details down to the pore level of the skin. We worked with a team from the University of Southern California, who use this technology to 3D-scan Hollywood actors. And then the Smithsonian 3D team used hand-held structured light scanners to scan the rest of the bust – the sides of the face, under the chin, the back of the head. They put these two data sets together in order to create the model used for the 3D print." The museum believes that 3D-printing could have important applications in terms of teaching history. For instance … scanning a political leader "has the potential to connect people to his life and times and legacy with an immediacy that a simple photograph or a painting simply cannot convey," said Gunter Waibel, director of the digitization program office, in the Smithsonian's online announcement.

According to the museum, several attendees opted to take selfies with the life-size Obama replica – something that Obama, hasn't done yet.

It is worth noting that if you search for "3D Obama head" on Google, you will also find "Chocolate Obama Scented Soap Head – mini 3D Obama Soap Head in chocolate Scent" for sale on Amazon **(FIG. 2).** God bless America and its ingenuity!

• • •

THE EXHIBITION AT THE MUSEUM OF ARTS AND DESIGN

RONALD T. LABACO*

"We wanted to correct the public misperception that the use of digital technologies in the creation of art and design does not involve the use of one's hand, that it's just press and print."

As a curator at the Museum of Arts and Design (MAD), I organized the exhibition "Out of Hand: Materializing the Postdigital," the first major museum exhibition to explore digital fabrication on this scale across art, design, and architecture, and one of the best attended exhibitions the museum has ever mounted **(FIG. 1).** It was not a contradiction that a museum that started as the American Craft Museum would mount an exhibition about digital fabrication. In fact, it's the opposite. We wanted to correct the public misperception that the use of digital technologies in the creation of art and design does not involve the use of one's hand, that it's just press and print. The exhibition included more than 120 works from 85 of the foremost practitioners from 20 different countries. It represented conceptual and aesthetic trends, which seem to have evolved over the course of the last eight years. We also incorporated a 3D scanning and 3D printing lab for people to experience the technologies first-hand.

FIGURE 1. Installation photo from the Out of Hand exhibition at the Museum of Arts and Design (MAD) in New York, showing works by Wim Delvoye (foreground) and Barry X Ball (back center).

In today's world of art and design, discourse is no longer preoccupied with the technology in and of itself, but rather with how technology may be creatively applied in the interplay between digital and analog, natural and man-made, biological and cultural, and virtual and real.

3D printing is an additive process, a magical technology where you start off with nothing and end with an actual object. Material is built up in layers successively and very precisely to create an object, similar to coil building a clay pot, where you have rings on top of rings; you smooth them together

* Ronald T. Labaco is the Marcia Docter Curator, Museum of Arts and Design in New York. He organized the museum's exhibition "Out of Hand: Materializing the Postdigital," October 16, 2013 – June 1, 2014.

Additive Manufacturing

3D Printing
- Stereolithography (SLA)
- Selective Laser Sintering (SLS)
- Fused Deposition Modeling (FDM)
- Direct Metal Laser Sintering (DMLS)
- Inkjet Powder Printing (3DP)
- Laminated Object Manufacturing (LOM)
- Paste Extrusion
- Polyjet

Subtractive Manufacturing

Computer Numerically Controlled (CNC) Fabrication
- CNC-Milling
- Machining
- Lathing
- Sawing
- Drilling
- Laser Cutting
- Hot-Wire Cutting
- Plasma Cutting
- Waterjet Cutting

FIGURE 2. Digital fabrication involves either additive or subtractive processes.

and you have a pot. But the exhibition also addressed CNC, an acronym for computer numerically controlled fabrication, a subtractive manufacturing process which includes computer-assisted milling and machining **(FIG. 2).** CNC is more akin to traditional carving, drilling or sawing, where a block of solid material is carved away, but in this case, is controlled by a robot that receives information from a computer.

THE PROCESS

With 3D printing, everything starts off in the computer as a digital model — either through 3D modeling using software or 3D scanning, where an instrument captures an object, which then exists as a model in the computer. Imagine a hologram in a computer. The information is in a digital file, and computer-aided design (CAD) software realizes the model and sends the information to the respective machine in successive layers, directing the machine to either add or subtract layers. 3D printers, both large commercial ones and desktop, operate by building up layers into a volume, which is limited by the size of the build chamber. To create large objects, you must either use a large machine or make objects in pieces.

Computer numerically controlled (CNC) fabrication also starts off with a digital model, but in this case, the model is sent to a CNC fabrication machine via computer-aided manufacturing software to control robots that then carve away at a solid block of material.[1]

THE EXHIBITION

Now for some of the artists who were represented in the exhibition and how they incorporated these technologies into their work.

FIGURE 3. Installation photo from the MAD exhibition showing Richard Dupont's *Untitled (#5)*, 2008. Pigmented cast-polyurethane resin.

Richard Dupont's work provides a good illustration of the complex, multi-step process and the extent to which an artist will go to manipulate the existing technologies as part of their individual practice. Dupont scanned his entire body in 2001 in order to capture the data and apply it to future artworks, such as a larger than life figure created in 2008 **(FIG. 3).** In 2001 he didn't have many scanning options; he could access the technology only via the Hollywood special effects industry or via

[1] At the *IFAR Evening*, the actual manufacturing processes were demonstrated via film clips.

a military base. He chose the latter. Once he had himself as a digital file, he still was not happy with the detail. So he cast his head and body parts in plaster, scanned the plaster cast, and digitally pasted the parts together into a fully detailed human 3D model. Then he manipulated it by running a wave through it in one direction. So as you walk around the figure and look at it head on, along the perpendicular plane, you see an exaggerated wavy effect. But from other perspectives, along the parallel plane, it dissolves and the silhouette remains that of a normal figure, although you still see the shadows from the wavy contour. How did Dupont achieve this effect? Starting with the digital file with a wavy aspect to it, he used a CNC milling machine to mill a foam version of the sculpture in parts. The whole was then assembled and finished, and he then created a mold and cast the piece in polyurethane. It is clear from the 2008 example that the artistic purpose of using these technologies is not the economy of time but the previously unavailable opportunities for expression and the new media offered by the technologies themselves.

The exhibition included works that were influenced by nature, such as the *Imaginary Iceberg* by Maya Lin, made from milled foam covered in plaster. It originated from a project in which Lin realized existing bodies of water in 3D as sculptural objects **(FIG. 4)**.

FIGURE 5. FRANK STELLA, *K.162,* 2011. Resin, lacquer. Courtesy of Freedman Art, New York. L.2013-78.1. © 2014 Frank Stella / Artists Rights Society (ARS), New York.

Frank Stella has been using 3D printing since 2006, inspired by his interest in architecture and architectural models. His work is distinctive in terms of the application of vibrant color and because he sees the white 3D-printed works as three-dimensional canvases, as dimensional paintings, rather than as sculptures **(FIG. 5)**. The Japanese artist Hiroshi Sugimoto exhibited a sculpture of a mathematical model made of milled aluminum with the point extending to infinity stretched out as far as the material could sustain.

There were several interactive works at the exhibition, including one enabling visitors to create a customized model of a 3D-printed lamp based on one's motions and the color of one's clothing **(FIG. 6)**.

FIGURE 4. Installation photo from the MAD exhibition showing Maya Lin's *Imaginary Iceberg,* 2009. Plaster.

FIGURE 6. Installation photo from the MAD exhibition showing François Brument & Sonia Laugier's *KiLight,* 2011, an interactive work responding to one's actions and clothing color to custom design a 3D-printed lamp.

By manipulating the air in front of an Xbox Kinect, one could alter the shape and form of a digital model projected onto the screen. Once the design was one that they liked, the visitor only needed to freeze for two or three seconds for the model to be captured as a digital file that ostensibly could be sent to a 3D printer to create a pendant lampshade.

A section of the exhibition that I called the "Rebooting Revivals" included artists whose works were inspired by the past or by past artistic movements. These included the Belgian conceptual artist Wim Delvoye and the sculptor Barry X Ball, who is part of this IFAR program.

Many artists, including Chuck Close, are exploring the capabilities of digitally woven tapestries **(FIG. 7)**. The "Pattern as Structure" section included a column by the German architect Michael Hansmeyer, with its surface divided into six million individual facets. He was inspired by the idea of morphogenesis, or cell division, and applied it to the surface of an architectural element. Hansmeyer then CNC-laser cut 2,700 layers of cardboard very precisely so that when they were stacked, the captured form was very intricate and highly organic.

FIGURE 8. NERI OXMAN and The Mediated Matter Group, *Silk Pavilion,* 2013. The architect and her team studied the patterns of silkworms spinning their cocoons and created a framework for 6,500 worms to spin a silk canopy. Photo: Steven Keating.

The "processuality" section included pieces by Roxy Paine from his "Scumak 2" artwork, digitally milled works by Allan McCollum, and digitally extruded concrete sculptures by Anish Kapoor **(FIG. 9)**.

FIGURE 7. Installation photo from the MAD exhibition showing Chuck Close's *Self-Portrait / Five Part,* 2009. Jacquard tapestry, digital weaving. Edition of 6. Courtesy the artist and Magnolia Editions.

FIGURE 9. Installation photo from the MAD exhibition showing works by: Greg Lynn (left foreground); Anish Kapoor (left wall and pedestals); and Allan McCollum (right center).

Neri Oxman from the MIT Media Lab harnessed the biological instincts of 6,500 silkworms to help her create a 10 x 10 foot silk pavilion tent **(FIG. 8)**. She examined the patterns of silkworms spinning their cocoons and then provided a structure for them to do what they do naturally.

The technology of 3D printing is so vital and engaging that blogs address it on a weekly basis. A recent *Design Boom* article showcased several 3D-printed works, including Jake Evill's "Cortex Cast System" where a cast for broken or fractured bones is based on an exoskeleton of a limb that

is scanned for a precise fit **(FIG. 10)**. The system changes the concept of how a cast can be made, and, since the cast is comprised of 3D-printed nylon, it is also more hygienic and can be washed. The article also mentioned Shamees Aden's conceptual project, the "Amoeba Trainer," which is still being realized. It combines 3D printing technologies with proto cells to create footwear that responds to the user.

FIGURE 10. JAKE EVILL, *Cortex Cast System,* 2013. Nylon.

FIGURE 11. SCOTT SUMMIT. *Bespoke Fairings,* 2011. 3D-printed nylon custom-tailored prosthetic leg covers. Made by Bespoke Innovations. Photo Courtesy 3D Systems.

The MAD exhibition included other works that dealt with similar issues. Scott Summit's *Bespoke Fairings* are customized decorative plates for below-the-knee prostheses **(FIG. 11)**. The makers scanned the existing limb for symmetry and then the decorative plates were either 3D printed or milled. We also featured 3D-printed fashion; for example, shoes that are an extension of the foot bones **(FIG. 12)**. Many works in the show were inspired by the growth of bone and bone structures. In a similar vein, and for more commercial purposes, we had a Nike digitally knit shoe made for the marathon runners in the 2012 Olympics. It was based on the idea of digitally knitting an upper that simulated tendons wrapping around the foot.

FIGURE 12. NAIM JOSEFI. *Melonia Shoe,* 2010. Polyamide; laser sintering. Courtesy Naim Josefi. Photography Johannes Helje and Clara Nova.

In the world of architecture, but not in the 3D exhibition, is the pavilion created in 2012 by Achim Menges and Jan Knippers for the University of Stuttgart using directed fiber placement. A robot controlled the fibers in a similar way to silkworms weaving their silk around an existing structure.

> "It is the future—science fact, not science fiction."

In another example from architecture, we saw fibers woven to create a prototype 3D-printed house that would be printed in sections and then assembled on site. The density of the fibers would allow for the structure to withstand pressure and support weight. In still another example, Behrokh Koshnevis envisions a future in which houses can be 3D printed in two weeks. The builder simply changes the cartridges for different materials. The finished 3D-printed house would have integrated plumbing as well as electricity and windows.

We included other conceptual pieces. They allow us to imagine, by extension, the idea of sending 3D printers to the moon or to Mars, or to use ambient materials to create structures. It is the future — science fact, not science fiction. These are just some examples of the incredible and exciting work that is being made today with 3D printing.

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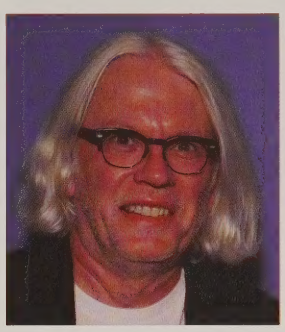
DIGITAL TECHNOLOGIES FOR CREATING SCULPTURE

BARRY X BALL*



For nearly 20 years, I have been using advanced digital technology in the creation of my sculptures. I employ four main technologies: 3D digital scanning, CNC milling, 3D printing – also known as rapid prototyping – and digital manipulation or digital modeling. I will highlight three examples of my work that I created employing these technologies – the first was shown at the Venice Biennale, the second at the Museum of Arts and Design, and the third is a work in progress.

VENICE: THE *SLEEPING HERMAPHRODITE*

Twenty-four of my sculptures were exhibited at the 2011 Venice Biennale in a special exhibition at Ca' Rezzonico, the museum of the 18th century and the largest palace in Venice, located on the Grand Canal. For many years, my work has been redolent of ancient sources. The genesis of the exhibition was my desire to interact even more directly with the art of the past, especially historical sculptures. This led to the creation of what I call – irony intended – my "Masterpiece" sculptures. The masterpiece that inspired and initiated my new body of work was the famous *Hermaphrodite Endormi* or *Sleeping Hermaphrodite* in the collection of the Musée du Louvre in Paris **(FIG. 1)**, a piece that has been worked on by numerous artists over more than two millennia.

The original *Hermaphrodite* was a second century B.C. Greek bronze. A second century A.D. Roman marble copy, lost for almost fifteen hundred years, was unearthed near the Baths of Diocletian at the time of Scipione Borghese, who acquired it and in 1619 hired his young house genius, Gianlorenzo Bernini, to create a marble bed for it. The Roman *Hermaphrodite* had been sleeping on just a slab. According to the Greek myth, Hermaphroditus was the beautiful young son of Hermes and Aphrodite. The nymph, Salmacis, fell in love with him, but he rejected her. One day, as he was bathing in a pool of water, she grabbed him, and as he was pushing her

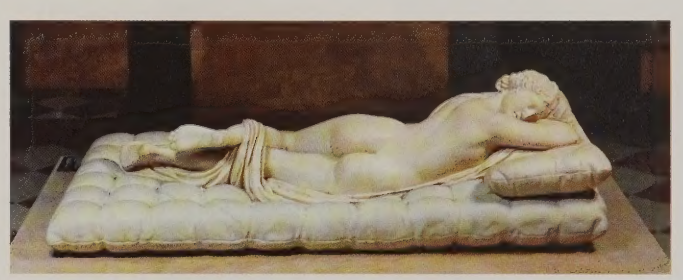


FIGURE 1. *Hermaphrodite endormi (Sleeping Hermaphrodite).* Roman, 2nd century AD. Marble. Tufted bed, Gianlorenzo Bernini, 1619. Musée du Louvre, Inventory no. MR220.

* Barry X Ball is a contemporary sculptor living in New York. He is represented by Sperone Westwater.

away, she implored the gods, "Let us be united!" And they were, in one body.

"After all the digital work and scanning and seven months of using progressively finer cutters during the CNC milling … we brought the piece to my studio for hand detailing."

My idea was to consolidate the work of all the artists who had contributed to the *Hermaphrodite*. Besides Bernini's bed, David Larique and others restored the figure – the Louvre sculpture is a mosaic. I wanted to write the final 21st century chapter in the work's history by carving a monolith out of one massive block of Belgian black marble. I originally proposed a one-work exhibition, an installation of my *Sleeping Hermaphrodite* under the Murano glass chandelier in the center of the Brustolon Room at Ca' Rezzonico, amidst the furniture, pedestals and free standing sculptures carved by Andrea Brustolon, a fantastic Baroque wood carver. His figures in that room are all African males, "Moors", and I wanted my sensual black stone counterpart to rouse from its sleep amidst the male slaves **(FIG. 2).** The exhibition eventually grew, however, into a show of 24 of my works arrayed throughout the museum.

FIGURE 2. BARRY X BALL. *Sleeping Hermaphrodite.* 2008-2010. Belgian black marble. 174 x 91 x 80.3 cm (68-1/2" x 35-13/16" x 31-5/8"). Shown installed in the Brustolon Room of Ca' Rezzonico, Venice Biennale, 2011.

Most people who ask about how my work is made say they understand how we get data into the computer. The question is how do we get it out (to create physical sculptures)? Ron Labaco explained how 3D objects are made out of digital data, but I would like to follow up with examples from my personal experience by describing the entire process of making the *Sleeping Hermaphrodite.*

First, using a state-of-the-art Breuckmann white light scanner, my team and I took about four hundred individual 3D images and pieced them together **(FIG. 3).** We worked in the Louvre in the famous Salle des Caryatides, surrounded by some of the world's greatest Greek and Roman sculptures.

FIGURE 4 shows the unmanipulated data, with the historical damage – the chips in the sculpture – visible. **FIGURE 5** shows a 3D rendering of what I wanted to make, after an extensive amount of digital manipulation. We "sculpt" the data with computers using a variety of software programs, and to check our work we make 3D prints. You can visualize things well onscreen but there's nothing like having a reference object. This model was produced by an expensive 3D printer, a top-of-the-line Viper Pro.

FIGURE 3. Collecting data on the *Hermaphrodite endormi* with a Breuckmann white-light scanner at the Louvre.

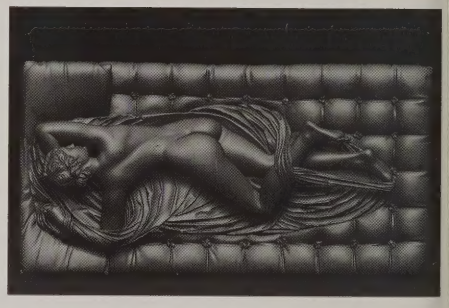


FIGURE 4. Unmanipulated data collected from white light scans of *Sleeping Hermaphrodite* at the Louvre. Image showing historical damage (chips) to the sculpture.

FIGURE 5. The high resolution, 3D-rendered model that has been extensively digitally manipulated.

Continuing my quest to create the black hermaphrodite, I visited Belgium's famous black marble quarry, 300 ft. underground. Tunnels have been dug over more than a thousand years to harvest the only marble in the world that is jet-black without venation. After I selected one of the largest blocks ever extracted **(FIG. 6)**, we shipped it to the Digital Stone Project in New Jersey, a facility that no longer exists.

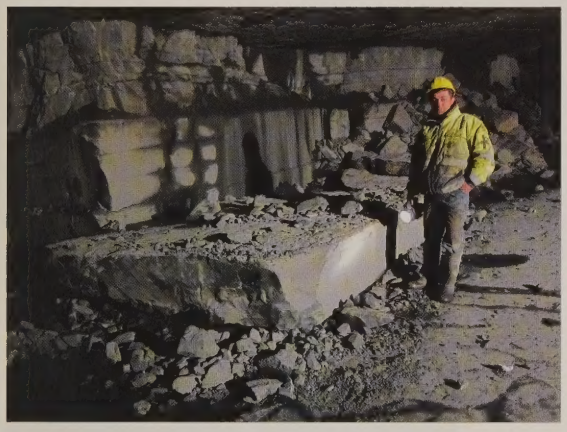


FIGURE 6. The block of marble selected from Black Marble Quarry, Belgium.

At the facility, my assistants removed the scale from the marble's surface **(FIG. 7)** and put the three-ton block on a large four-axis CNC mill to flatten it **(FIG. 8)**. They then tested a portion of the marble, the tufted bed, with a diamond water-cooled cutter to determine the best way to mill it **(FIG. 9)**. We strove to achieve a corduroy surface on the bed tufts, but the machine couldn't do better with the tassels than what you see in **FIGURE 10.** So every one of the tassels had to be hand carved, underscoring the insurmountable fact that this long process is far from just pressing "print" and having an object appear.

FIGURE 7. Artist's assistant removing scale from surface of marble at Digital Stone Project, NJ.

FIGURE 8. Moving a three-ton marble block onto four-axis CNC mill to flatten it.

FIGURE 9. Testing a tufted bed of marble with a diamond water-cooled cutter to determine optimal milling.

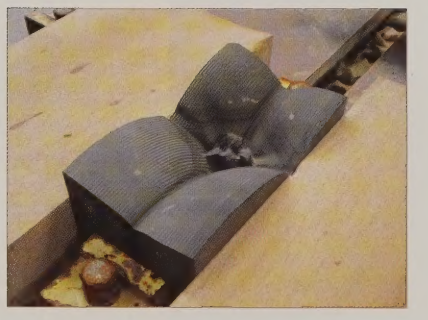


FIGURE 10. Image showing that the tassels had to be hand carved because this machine could not achieve the best results while at the same time producing the desired corduroy surface.

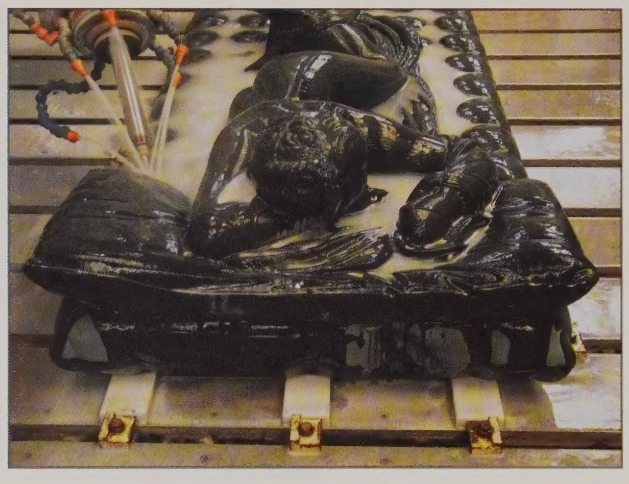


FIGURE 11. Image showing the figure beginning to emerge from the marble slab as the water cools and washes away the excess stone slurry.

FIGURE 11 shows the figure beginning to emerge. The water is used not only to cool the cutting operation but to flush away the stone slurry. From a very expensive three-ton block of black marble, we ended up with a one-ton sculpture. Two tons were effectively "vaporized".

After all the digital work and scanning and seven months of using progressively finer cutters during the CNC milling on a large, five-axis OMAG mill, we brought the piece to my studio in Brooklyn for hand detailing. More than fifty-five hundred person hours were then spent hand working the sculpture. **FIGURE 12** shows the 3D-printed mini version of the *Sleeping Hermaphrodite* that we used previously to check our digital modeling and were now using as a guide to check our hand carving of the undercuts the machine couldn't reach. Once the carving was finished, we carefully polished the work, progressively moving through the grits and polishing compounds; masked the body prior to sandblasting; and created the base, which was CNC milled from white Carrara marble. And voilà – the finished sculpture, weighing 1,900 pounds! **(FIG. 13)** We kept one wound from the past, a vestigial removal of the fingers. I decided to leave them broken as kind of a Duchampian play on "art is in the head, not the hand." In the case of this sculpture, there was a lot of hand in the work!

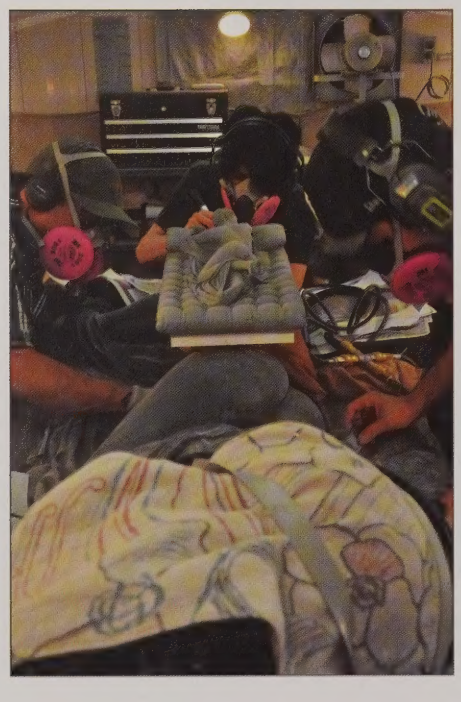


FIGURE 12. A 3D-printed mini version of *Sleeping Hermaphrodite* being used as a guide for hand detailing.

FIGURE 13. Barry X Ball, *Sleeping Hermaphrodite.* Completed sculpture.

PERFECT FORMS – BOCCIONI REDUX

My sculpture, *Perfect Forms* **(FIG. 14),** which was in Ron Labaco's "Out of Hand" exhibition and was realized through 3D printing, was inspired by Umberto Boccioni's *Unique Forms of Continuity in Space* – a futurist icon and masterpiece. I wanted to take what Boccioni had started to completion. Boccioni was a painter, not a sculptor. He was perpetually poor, but he hired two plaster workers, an old man and a boy, to make the model **(FIG. 15).** However, the sculpture was never realized by Boccioni in any permanent material. It and his other plaster sculptures were exhibited in Paris near the end of his lifetime, but were not well-received. Like all the Futurists, Boccioni was enamored of war. He took off to WWI and was dragged to death by a horse, which, among other reasons, is why his sculptures were never realized in permanent materials. The original *Unique Forms* plaster, now in a museum in São Paulo, Brazil, has been damaged and restored many times, so it bears only a partial resemblance to what Boccioni left behind **(FIG. 16).** Nonetheless, I was very lucky to have the cooperation of the museum as I worked.

FIGURE 14. BARRY X BALL. *Perfect Forms,* 2010-2013. Inspired by Umberto Boccioni, *Unique Forms of Continuity in Space,* 1913. 24K gold on nickel on copper on SLA rapid prototype model.

FIGURE 16. UMBERTO BOCCIONI (Italian, 1882-1916). *Unique Forms of Continuity in Space,* 1913. Plaster. Museu de Arte Contemporânea de São Paulo, Brazil.

"I wanted to take what Boccioni had started to completion. … The sculpture was never realized by Boccioni in any permanent material."

FIGURE 15. Photograph showing Umberto Boccioni and his mother with assistants and *Unique Forms of Continuity in Space,* realized here in plaster. Photo: Courtesy Barry X Ball.

Many posthumous bronze copies of the work – first, second, and perhaps third generation casts, maybe more than 20 in all – are in the collections of the Museum of Modern Art, the Metropolitan Museum of Art, the Tate, and others. I was given access to one in Switzerland, and my team 3D digitally scanned it. Whoever cast the Swiss version eliminated the integral base plate that was in the Boccioni original. Moreover, it was a later-generation cast. Every time you make a bronze it shrinks. You make a copy of a copy, and it shrinks again.

Therefore, the presence of the bronze Boccioni sculptures is diminished – and we see a lesser version of what Boccioni intended.

From the 3D scan data, my studio staff and I created a digital model **(FIG. 17).** My goal was to fully realize what Boccioni strove to do, to physically depict the fourth dimension, to unify a figure in motion and the space around it. We transformed every rough curve of the Boccioni bronze into a mechanically smooth surface to make "the Ferrari of Boccionis." I wanted to realize the piece in mirror-polished 24 carat gold, to extend Boccioni's concepts so that it reflected the world around it in the ultimate metal **(FIG. 18).**

FIGURE 17. 3D digital model created from the scans of the cast in Switzerland.

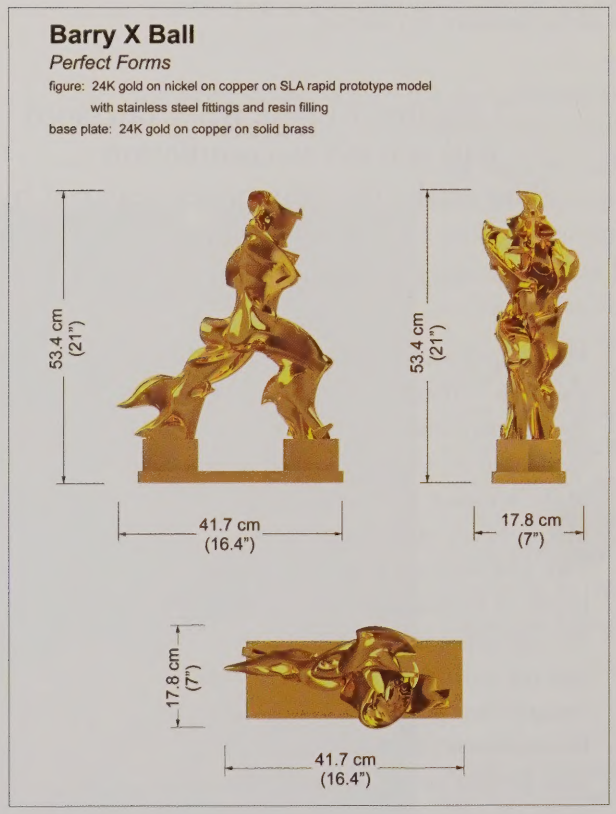

Barry X Ball
Perfect Forms
figure: 24K gold on nickel on copper on SLA rapid prototype model
with stainless steel fittings and resin filling
base plate: 24K gold on copper on solid brass
53.4 cm (21")
41.7 cm (16.4")
53.4 cm (21")
17.8 cm (7")
17.8 cm (7")
41.7 cm (16.4")

FIGURE 18. BARRY X BALL. *Perfect Forms,* 2010-2013.

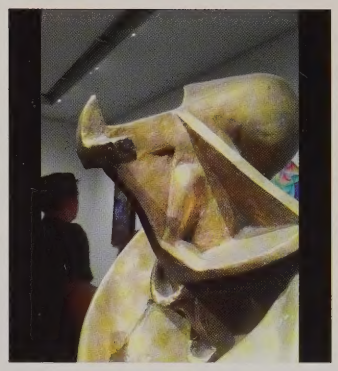


FIGURE 19. BARRY X BALL. Detail of a rendering. **A (left).** A crude museum cast. **B (right).** Barry X. Ball's version.

FIGURE 19 A and **B** shows a detail of a rendering of what I wanted to make with all of the curves and forms perfected. My version is on the right; a crude museum cast of the Boccioni is on the left.

To create an approximately 21-inch-tall 3D printed model, we again used a Viper Pro machine. Two hundred and fifty plus hours later, after removing the layered build lines to create an ivory-like surface, we had a very smooth 3D rapid prototype. We then filled it with stainless steel and resin to strengthen it **(FIG. 20).** Next, we coated it with a thick layer of copper via electroplating and then

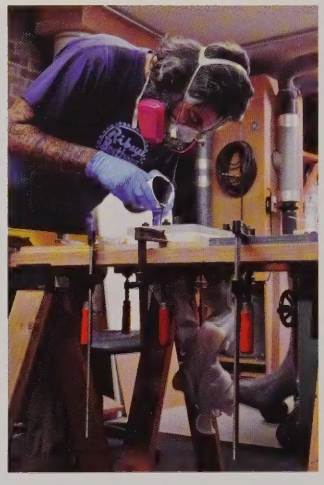


FIGURE 20. The 21" tall 3D printed model is filled with stainless steel and resin to strengthen it.

FIGURE 21. Mating the sculpture to the solid brass gold-plated plate.

"We transformed every rough curve of the Boccioni bronze into a mechanically smooth surface to make the 'Ferrari of Boccionis'."

hand carved and detailed the copper skin for another two to three hundred hours. My friend, Mike Dunlap, who makes the gold trophy car that's awarded to the NASCAR series winner every year, did the polishing. Finally, we coated it first with a layer of nickel and then a very heavy coat of 24 carat gold, and then we mated the sculpture to its solid brass gold plated plate **(FIG. 21).** And voilà! **(FIG. 14)** My next iterations of the sculpture are going to be at the actual scale that Boccioni intended, although in a variety of materials, translucent and reflective, to again extend the Boccionian concept of unifying a figure and its surrounding space. I am currently working on versions in translucent white Iranian onyx, Belgian black marble, and solid stainless steel. The most grandiose version will be three meters high, placed on the interior stairs of a Tadao Ando-designed museum in Central Beijing, inspired by the installation of the *Nike of Samothrace* on the grand stairway at the Louvre.

FIGURE 22. Prince Albert of Monaco. Photo: Barry X Ball.

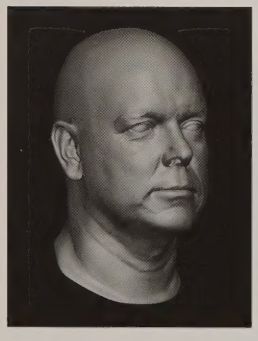


FIGURE 24. Digital model of Prince Albert.

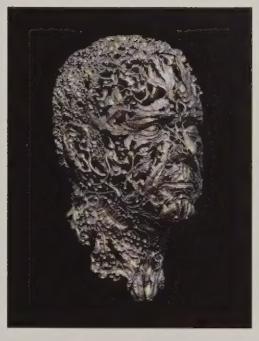


FIGURE 25. A: Rendering in seaweed of sculpture in progress of Prince Albert; **B:** the back of the sculpture, featuring the Crest of Monaco.

FIGURE 23. Photographing and scanning Prince Albert in Barry Ball's studio.

BUST OF PRINCE ALBERT OF MONACO

To conclude my presentation, I would like to discuss, briefly, a project in progress, my portrait head of His Serene Highness, Albert II of Monaco **(FIG. 22).** Prince Albert came to my studio, where he was scanned and photographed **(FIG. 23).** After a lot of digital sculpting, we created a digital model **(FIG. 24).** My idea was to then make something, utilizing 3D printing, that wouldn't be possible with any other technology. I wanted to generate his head from the inside out. Albert is a great supporter of the conservation of the world's oceans. He has built an incredible Oceanographic Museum in Monaco. In homage to that, I decided to create the sculpture out of seaweed **(FIGS. 25 A** and **B).** Hidden in the back is the Crest of Monaco, with the Crown and paired 'A's for Albert. Ultimately, the head will be printed in direct stainless steel and / or gold.

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THE MEDIALAB AT THE MET

DON UNDEEN*

"This process is analogous to what the Met's MediaLab is all about: inviting people in and making art accessible to them through technology."

We have seen amazing high quality art created through 3D technology. But I am not going to address that. Rather, I am going to discuss the weird stuff we do at the Metropolitan Museum of Art's MediaLab. Our two-and-a-half year existence has been a process of discovering what a MediaLab at the Met should be. We have arrived at a methodology where we invite New York's creative technology community to have a conversation with our curators, educators, and conservators about using the museum's content and expertise in new ways. We have created a dialogue where new technology is part of the conversation about the thousands of years of making art represented at the Met.

3D AND THE MUSEUM

To provide some background, the Met has had a few 3D-printed objects in its collection for some time. In 2007 we acquired the 3D-printed Fractal. MGX algorithmically designed coffee table, and in 2000, we acquired Lilliputian male figures by the artist Karin Sander. In other words, we have been keenly interested in 3D printing for more than a decade. But two factors suddenly made the technology more accessible and more exciting. The first was that patents expired and 3D printers became more affordable. The second was the advent of Autodesk's free photogrammetry software, 123D Catch, which runs on the Cloud. Although an artist or other professional wouldn't use this software for very high end 3D scanning, it has brought 3D printing to the masses. Traditionally, most museums have had a photography policy: don't use flash; don't photograph it in our exhibition space; don't do it with contemporary art. But in many museums today, anyone can take numerous photographs of an object, enter the data into 123D Catch, and wait for the program to deliver a 3D model with all of the surface texture intact. This process is analogous to what the MediaLab is all about: inviting people in and making art accessible to them through technology. We believe, after all, that there are different ways of looking at art.

Besides 123Catch, we also use AutoCAD software; for example, Tinkercad. It is kind of cartoon colored; and web-based; you can use it on just about any computer web browser; it's simple. With Tinkercad you can import digital models or combine them with other digital models. You can crop pieces off your model in different shapes. The software does only a few things but does them very well, and it's wonderful at making downloadable

*Don Undeen is Senior Manager of the MediaLab at The Metropolitan Museum of Art, New York.

models for 3D printing. In one day, I can guide people through an entire process of photogrammetry modeling and printing and making their own art. That is if we are lucky and the printer doesn't break. Unfortunately, with consumer grade 3D printers, we are still living in a tinker's paradise.

"Meeting the curators, listening to them, and understanding what these objects meant to them led the artists into a profoundly transformative experience of reinterpreting those meanings in their own digital creations … "

THE HACKATHON

The MediaLab met with MakerBot (manufacturer of 3D printers) to explore what we could do with 3D printing technology and decided to host a hackathon. For the uninitiated, a hackathon is when you get a bunch of smart people in a room, feed them too much caffeine and pizza and beer, provide them with a work space and WiFi, and let them go nuts. We invited about 30 digital artists who are part of New York's 3D maker/creative hacker/software developer scene. Over the course of three days, we walked around the museum and met with curators from various departments who discussed particular objects and their unique stories. One was Eric Kjellgren, a curator in our Oceanic Art Department

FIGURE 1. Eric Kjellgren, a curator in the Oceanic Art Department at the Metropolitan Museum, met with digital artists at the MediaLab's hackathon. Photo: Don Undeen.

FIGURE 2. A scene from the hackathon. Photo: David Neff.

(FIG. 1). The heartwarming – and thrilling – surprise was just how wrong our preconceptions of the hackers had been. We had privately assumed that the digital artists would come in and do whatever they wanted in the space. But, instead, meeting the curators, listening to them, and understanding what these objects meant to them led the artists into a profoundly transformative experience of reinterpreting those meanings in their own digital creations over the next three days **(FIG. 2).**

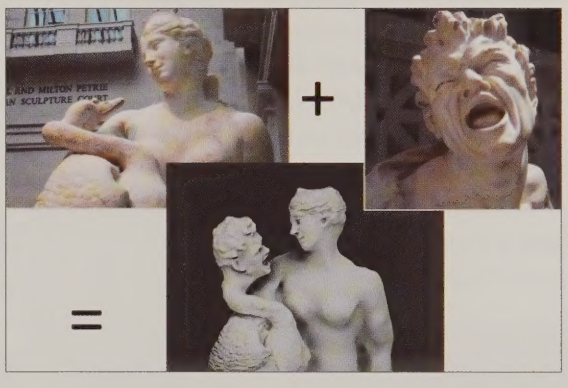

FIGURE 3. A Metropolitan Museum mashup: *Leda and the Swan* combined with *Marsyas.* Photo: Don Undeen.

We had eight MakerBot printers for the hackathon. 3D printing is slow; you can't have one printer for 10 people. Among the objects we created, my personal favorite was Ryan Kittleson's *Leda and the Marsyas* **(FIG. 3),** *Leda and the Swan* combined with *Marsyas.* I like the way that they are looking at each other. I think they are commiserating about the lousy deal they got from the gods. Marsyas has proven to be a popu-

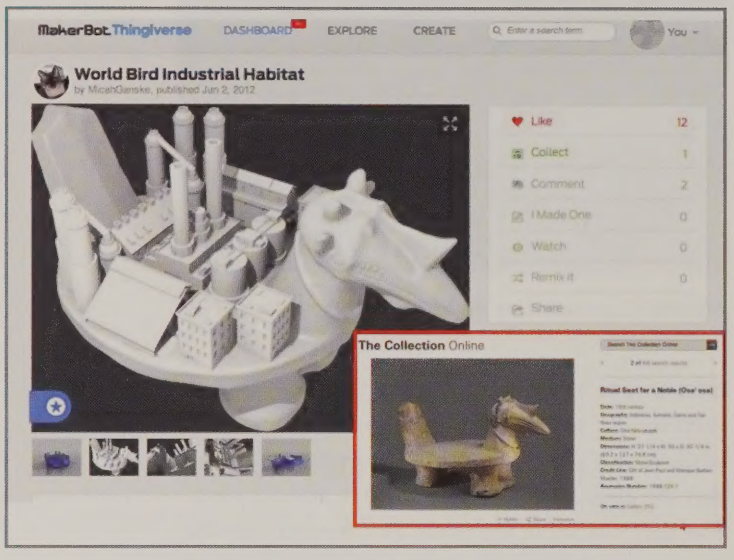

FIGURE 4. Hackathon artists took an *Indonesian Ritual Seat for a Noble* (lower right) and superimposed a factory on top of it. Screenshots from thingiverse.com and metmuseum.org.

lar character, which has been combined with many others. In another work, artist Micah Ganske took an *Indonesian Ritual Seat for a Noble* and superimposed his own seat of power by building a factory on top of it **(FIG. 4).** Annie Fresh, a Muppeteer/Muppet maker, gave a *Cambodian Durga* arms and turned her into a puppet **(FIG. 5).**

FIGURE 5. The artist ANNIE FRESH gave a *Cambodian Durga* arms and turned her into a puppet. Photo: David Neff, screenshot from metmuseum.org.

THINGIVERSE

All of the objects created at the hackathon were shared on thingiverse.com, which is like a Flickr for 3D models. It allows users to upload models, download other people's models, make something new, and share what they've made **(FIG. 6).** A remix is what you get when you take a model and make something new based on it. Original objects and remixes are connected on Thingiverse. When we upload one of our scans and someone makes a new version of it, we can track both objects and see how people are using our objects to make new things. Of course, you take the risk of relinquishing control over what people are going to do with your objects. But the risk is potentially rewarding. To illustrate the delicious alchemy of sharing art, while the hackathon was underway, an artist somewhere else in the world downloaded a head and made a Pez dispenser out of it. In a video called "We Met Heads On," the artist Matthew Plummer-Fernandez took heads, decimated them, reduced the resolution, and ran them through a synthesizer or a processor that deformed the heads in time to music.

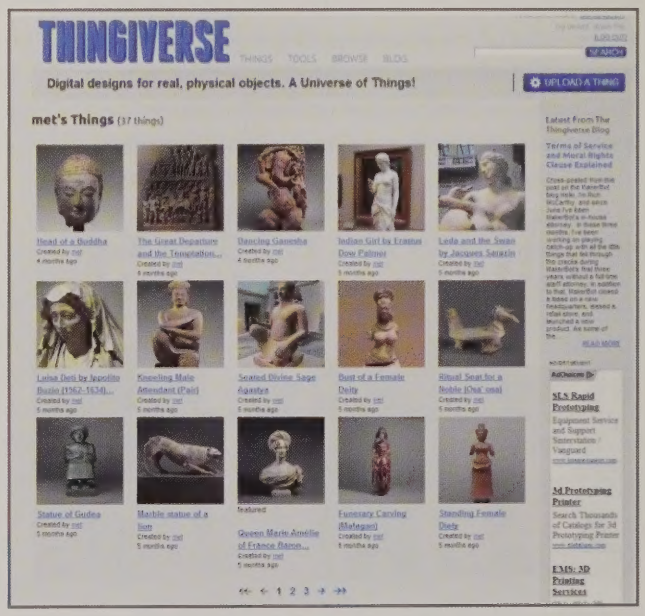

FIGURE 6. A page of Met models. Screenshot from thingiverse.com.

THE TEEN HACKATHON

After the hackathon, we hosted a five-day 3D workshop for teenagers where we walked them through the same process as at the hackathon. **FIGURE 7** shows some of their creations. The five tiny objects, all mashups, contain about 20 different Met objects within them. We have since made larger, higher resolution prints of all these objects and exhibited them at the Met's teen art show, the first time we had ever shown teen 3D-printed work at the Met.

FIGURE 7. This photo from the Metropolitan Museum's teen hackathon shows five mashups that contained approximately 20 different Met objects in them. Photo: Alayna Wiley.

EGYPTIAN FAÏENCE

Steve Hoskins and David Huson, two researchers from the Center for Fine Print Research at the University of the West of England, were looking for a single firing, self-glazing ceramic that could be 3D printed. They were having trouble finding a material that would actually work until they realized that the one single firing, self-glazing material that they could actually 3D print with was Egyptian faïence, epitomized by the Met's iconic William the Hippo. **FIGURE 8** is a 3D print of a scan of the toy eraser version of William printed in actual Egyptian faïence. This William is one of my favorite examples of a dialogue between ancient technology and contemporary technology to make something that's new and old at the same time. We still have a lot of catching up to do. We still cannot figure out how the Egyptians did it so well.

THE OCULUS RIFT

In addition to our printing physical artifacts that serve as avatars for something that exists in a digital form, interns work with the Met's collection in various ways. To give an example, one artist, using physical modeling software, downloads our models from Thingiverse and builds objects that would not possibly exist in the real world. He models them as digital 3D animations and even uses glitches in the software to create warped versions of our objects, deformed in previously impossible ways.

The Oculus Rift, which was just purchased by Facebook, is a virtual reality headset; you put it on your head and you are in the matrix. One of our interns took our 3D models and the models made by the artist mentioned above and put them in a virtual environment so that a viewer could both watch the animation happen from one perspective and navigate around it in a full virtual space

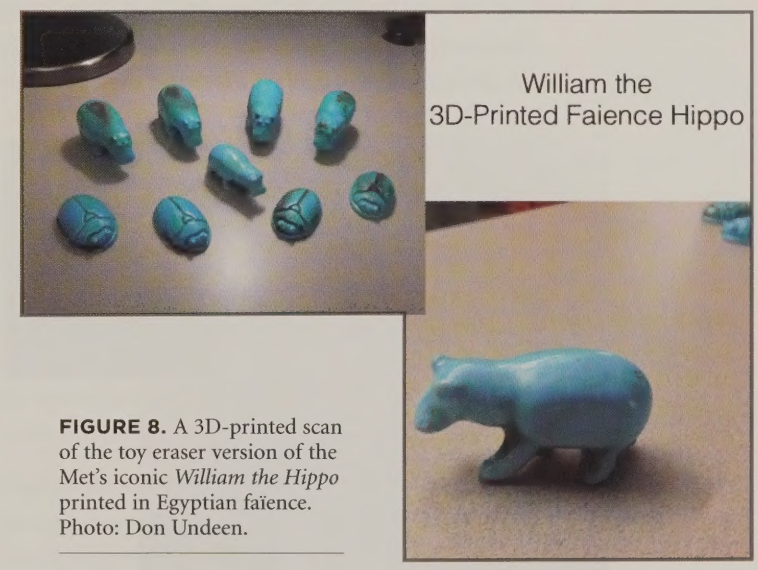

FIGURE 8. A 3D-printed scan of the toy eraser version of the Met's iconic *William the Hippo* printed in Egyptian faïence. Photo: Don Undeen.

(FIG 9). What is the pedagogic value of this? I have no idea, but it's awesome!

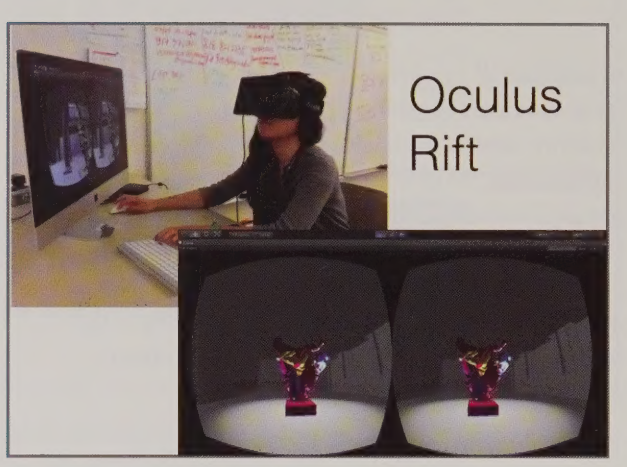

FIGURE 9. 3D-printed models can be animated in a virtual environment and viewed with the Oculus Rift. Photos: Don Undeen; Laura Chen.

2D BECOMES 3D

The Met MediaLab is also looking at ways that the museum's 2D collection can be interesting in terms of 3D. The artist Ryan Kittleson has been algorithmically processing two-dimensional paintings, extruding the light parts up and the dark parts down **(FIG. 10).** When I hand an image of this to people, they rotate it around, and then, when they look at it straight on, they always jump a little bit when they recognize it as a Rembrandt self-portrait.

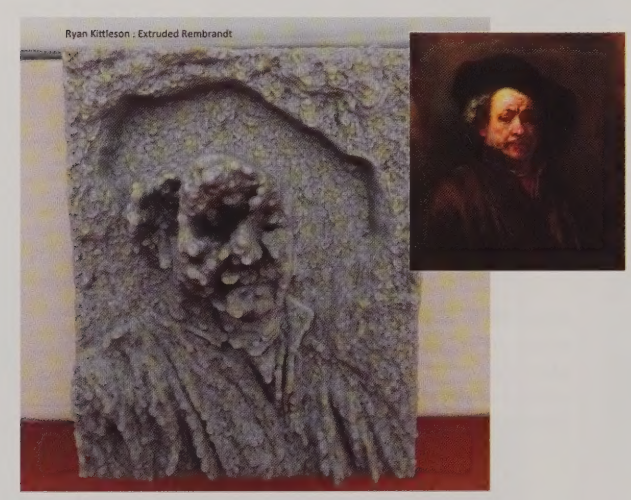

FIGURE 10. RYAN KITTLESON, *Extruded Rembrandt Self-Portrait.* The artist algorithmically processes two-dimensional paintings to make them three-dimensional. Photos: Don Undeen; Metropolitan Museum of Art.

Tom Burtonwood, a resident educator and artist at the Art Institute of Chicago, made a Japanese-style accordion book from photogrammetric scans from museums around the country **(FIG. 11).** It has a positive impression on one side and a negative impression on the other. He plans to make more editions like this with architectural elements and other things; it will be a resource that we could share to learn about shapes in a tactile way. We remixed his piece in our own way when he sent us an Accordion Book with spare pages.

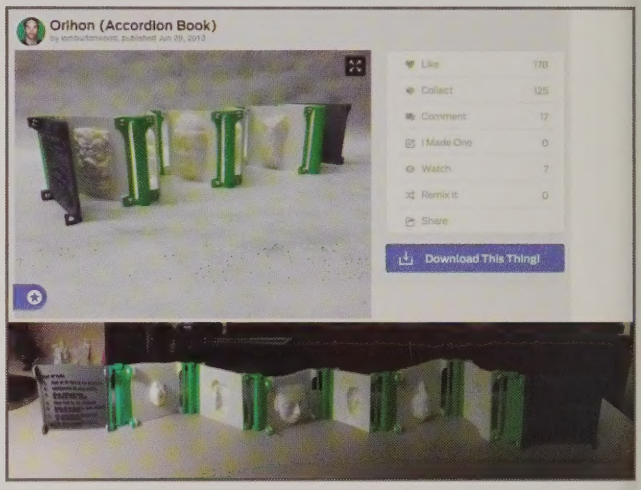

FIGURE 11. TOM BURTONWOOD, *Orihon (Accordion Book),* a 3D-printed Japanese-style accordion book made from photogrammetric scans from museums around the country. Photos: Don Undeen; Tom Burtonwood. Screenshot from thingiverse.com.

THE MAKER FAIRE

I don't know how many of you are familiar with Maker Faire, but it is like a science fair for grown ups taken to the nth degree. Maker Faire is where the community of people who like to engage with their curiosity by building things get together. The Faire involves loads of 3D-printed material as well as computers and giant robots and flame shooting dragons, etc. The Met's MediaLab had a table there to demonstrate the idea that all art is made

FIGURE 12. The Met MediaLab's table at Maker Faire. Photo: Don Undeen.

by makers and that artists have been using technology to make art since they figured out how to use their thumbs **(FIG. 12).** One side of our table was used to show off the teen 3D works, and we had our 3D printer actually running at that time. In the middle of the table, a computer was running the sculpting software. The left side of the table had clay for the kids. As you might imagine, that side of the table was mobbed. We let the kids use the 3D models from our accordion book remix as molds, so that they could press the clay into the pieces. Using a pressed head from one page and a pressed body from another, they made their own clay mashups based on our digital objects that we had also used for our own mashups. Obviously, the boundary between digital and physical and who is using what for what is getting all mixed up.

3D AS PART OF THE PROCESS

We have also been exploring how 3D scanning can be part of a longer process of art creation. Using our photogrammetric process, the artist Steven Fragale, primarily a jeweler by trade, created a print on a high resolution resin-based printer. He then used the print to make a silicone mold from which he did a wax cast of Marsyas **(FIG. 13).** On the right is the finished bronze. It is mindboggling for me to realize the bronze of Marsyas developed from photographs that we took of the marble in the galleries. Another artist, Isaac Budmen, is experimenting with texturing pieces, how to treat 3D prints chemically to smooth out the rough edges and then paint them to give them a more quote authentic texture.

FIGURE 13. STEVEN FRAGALE, *Marsyas.* Photo shows the wax cast on the left, from a print developed from a photo of the Met's marble bust, and the finished bronze on the right. Photo: Don Undeen.

THE MEETUP

We organized a meetup a few weeks ago to explore ways that the museums and makers could work together to bring art to the city. Tom Freudenhiem and Donna David, two members of our meetup group, took that idea very literally and created what I call "Fence-Mount Marsyas," a tiny model designed to fit perfectly in the black fencing in Central Park near the temporary fencing that was erected **(FIG. 14).** With Tinkercad you can turn any art object into an attachable piece. Imagine the delight of passersby seeing mysterious sculptural pieces stuck to the fence throughout Central Park.

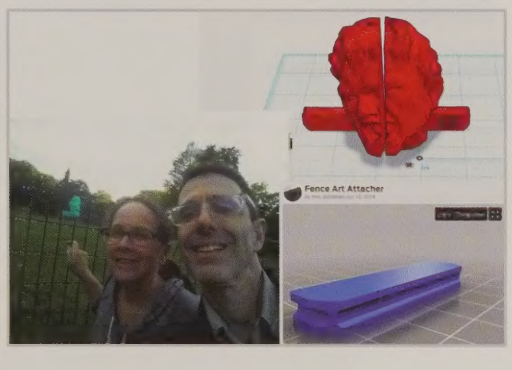

FIGURE 14. TOM FREUDENHIEM and DONNA DAVID, *Fence-Mount Marsyas.* The artists use Tinkercad to turn the bust of into a tiny attachable model. Photo: Tom Freudenhiem and Donna David. Screenshot from Tinkercad.com.

I have been working on a project called Interchangeable Art Parts, the idea that you can model a simple Lego interconnection piece as a whole

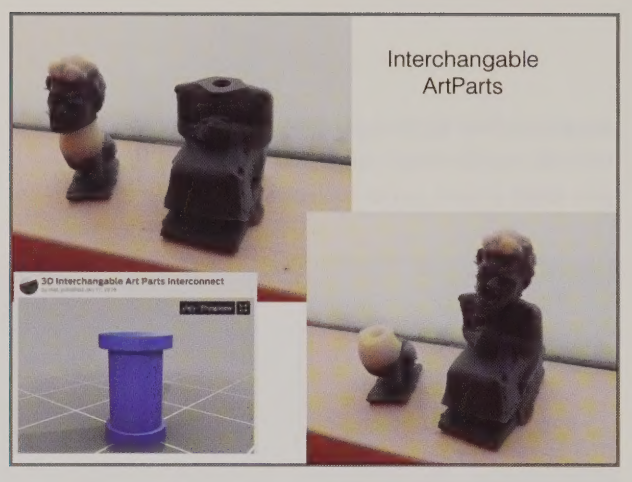

FIGURE 15. Interchangeable ArtParts, a Media-Lab project that develops Lego-like interconnection pieces for toys. Photo: Don Undeen. Screenshot from thingiverse.com.

and then insert that whole into any object **(FIG. 15).** We could then provide children with many little pieces of art objects that they could recombine in a very analog way and also combine with all of the other toys they play with.

We also explored the idea of decorating garbage and trash. At the meetup, one artist made what we called a "gum stamp." The idea was that if you see a gross piece of gum or some similar sticky thing on the ground, instead of being a do-gooder and picking it up, you could stamp it with your art stamp and turn it into a worthier object, for example, the head of Teddy Roosevelt, which is in the Museum of Natural History **(FIG. 16).** In the photograph, Hercules is on the right, but the artist gave him bug eyes.

FIGURE 16. Urban ArtStamps, a MediaLab project that permits an artist to turn a piece of garbage into a useable work of art. Photo: Don Undeen.

To reiterate, at the MediaLab, we want people to think of the museum as a place for creative reuse, the idea that they can visit the museum and not just look at an object and say "Oh, that's nice" and walk on, but examine it very closely and say, "What would I do with that? Could I make that into a Pez dispenser?" You know, the important art historical questions that we all want to address. This helps both to increase visibility for our collection and to heighten an observer's appreciation of the art. We are encouraging people to slow down and really look at an object. Personally speaking, each time I enter the Met and see Marsyas, I feel as though he's my personal friend because I've spent a lot of time looking at every little curve on his head.

"The boundary between digital and physical and who is using what for what is getting all mixed up."

BEST PRACTICES

Naturally, all this newfound accessibility to objects in our collection presents potential liabilities. From a purely legal perspective, we could just say avoid all the contemporary art and the loan objects because no one wants to go down that road. This is one of the reasons we keep curators involved in our processes. Currently, there are cultures where it might be acceptable to do certain things with an art object, just as you could do with a photograph of a painting, that would not be acceptable, or legal, in our museum. Promoting a best practices policy and making people aware of it when we are exhibiting objects is an important job for the museum. In our blog posts and with museum visitors, we discuss how to photograph an object in a respectful way, and we recommend that a photographer have a spotter with her when she takes a picture so that she's not bumping into people. There is, after all, a big difference between taking a picture of an object from a dozen sides and taking a "selfie." We also make sure that people have the opportunity to learn about the context of art objects. We try to share, as much as possible, the notion of cultural sensitivities so people understand what it is that they're doing, which most artists appreciate because they want that context. Finally, when we share our objects on Thingiverse, we like to include all of the object information and links back to our website, so that people always have opportunities to find and get more "stuff."

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THE VAN GOGH MUSEUM RELIEVO COLLECTION

AXEL RÜGER*

"The Relievo Project is not so much about engaging the public to do something with van Gogh as it is about appreciating his work in a different way."

In a way the Van Gogh Museum project that I will discuss is the polar opposite of the MediaLab at the Metropolitan Museum. It is a project that we officially launched to the public last year. I will add a disclaimer right from the start that this is not really about 3D printing. It involves another aspect of 3D technology, which I will go into later.

Our museum's mission is like that of any museum: we want to share the life and the art of Vincent van Gogh with as many people as possible, not only to enrich them, but to inspire them and also inspire them to do things with his work. This project, however, is not so much about engaging the public to do something with van Gogh as it is about appreciating his work in a different way. It was developed by the Van Gogh Museum in Amsterdam **(FIG. 1)**, which was founded in 1973 and holds the largest collection of works by Vincent van Gogh in the world — approximately two hundred of his paintings, five hundred drawings, and almost the entire correspondence. As you may imagine, with an artist of such incredible fame, it is a challenge to satisfy all the demands that reach us practically every day from all over the world to share our collection.

FIGURE 1.
The Van Gogh Museum, Amsterdam.

Everyone is familiar with Vincent van Gogh, whose active artistic career lasted only 10 years, and who committed suicide at the tender age of 37, which is part of that myth that has arisen around him. There is nothing better for your fame and

*Axel Rüger is the Director of the Van Gogh Museum in Amsterdam and the former Curator of Paintings at the National Gallery of Art in London.

reputation than committing suicide at a very early age because then you leave an unfulfilled promise behind that can take you to a stratospheric level, as it has taken Vincent van Gogh. Our collection has a number of his most iconic works **(FIG. 2),** so, as noted, the demands on us and on the collection for loans are intense. Whenever you can add the name van Gogh to the title of your exhibition, it's a guaranteed surefire hit. That is great for us, but it also puts a lot of pressure on us and on the collection. It was one of the reasons why we felt that we should investigate new ways of making the collection accessible. As paintings are physical objects, three-dimensional not two-dimensional, it was logical to think about three-dimensional reproductions of works by Vincent van Gogh.

FIGURE 3. A (left): 18th century reproduction of a Rembrandt print. **B (right):** 19th century print reproduction of *The Gleaners* by Jean-François Millet.

If we choose random examples of reproductions, such as an 18th century reproduction of a Rembrandt print and a 19th century print reproduction of a Jean-François Millet painting **(FIGS. 3A** and **B),** what is immediately noticeable is that reproductions, even in black and white, give us a fair sense of what the original work looked like in terms of the composition, distribution of light and shade, and so forth. Millet, incidentally, was a French Realist artist who was greatly admired by van Gogh, who was also a serious collector of reproductions.

Then came the advent of photography, a huge change in terms of how works of art were being reproduced, starting with black and white photography, then color photography, and then moving on to digital photography **(FIGS. 4A** and **B).** Each

FIGURE 2. Iconic van Gogh paintings in the Van Gogh Museum.

REPRODUCTIONS

Let me say a few words here about reproductions because soon after we launched our 3D project, we got into hot water about the issue of fakes and forgeries. If we remind ourselves about the history of reproductions, however, we will discover a Red Thread.

FIGURE 4. A (right): JOHANNES VERMEER, *The Girl with the Pearl Earring,* 1665, Mauritshuis, The Hague, and **B (left):** a photograph of the painting.

step in these reproductive processes – from the earlier printed prints on paper to photography – has represented an attempt to bring us closer to the original, to a more accurate reproduction of the original image.

For the purist, color reproductions have always had their pitfalls, such as color accuracy. It is easy to see a world of difference between the two randomly chosen color photographs of Michelangelo's *Last Judgment* in the Sistine Chapel **(FIG. 5).** That is why for a long time purists have held on to black and white photography, saying that rather than getting into distorted colors, let's leave the colors out. So generations of art historians have studied works of art based on black and white images – myself included. Some of my early professors felt that black and white was the lesser of the two evils.

FIGURE 5. Two color photographs of Michelangelo's *Last Judgment* in the Sistine Chapel, showing the variation in color quality.

"... In 2007, the museum was approached by Fujifilm in Belgium, which was thinking about developing a process whereby you could reproduce the surface texture of a painting extremely accurately ..."

RELIEVOS

With each step, we have been trying to get closer to the original, and that in essence is what our Relievo Project is all about. In our daily lives we cannot help but deal with reproductions of works of art; they are absolutely everywhere in advertising. Of course, reproductions are used also for personal enjoyment, be it postcards – in days when people were still writing postcards of course; sales are declining sharply, much to the plight of the museums – or for home decoration. There is hardly anyone I encounter, as director of the Van Gogh Museum, who doesn't tell me they had a poster of a work by van Gogh hanging in their house when they were young. Also, now people take endless photographs. At MoMA, people practically elbow each other out of the way in front of van Gogh's *Starry Night,* taking pictures and selfies.

There is also a rich industry around reproductions, such as calendars, which are widely disseminated in places like the Metropolitan Museum of Art. You may ask whether we can find justification for reproductions in terms of Vincent van Gogh himself. And yes, indeed, we can. In a letter to his brother Theo very early in his career, in 1882, he had just started as an artist and he was already thinking about how to make his work widely available, so that as many people as possible could enjoy it. He said:

> "... What I wrote to you in my last letter about a plan for making prints for the people is something to which I hope you'll give some thought one day. I don't have a fixed plan about this myself as yet, ... but I don't doubt the possibility of doing something like this, nor its usefulness. Nor can I doubt that people can be found whose heart would be in it. In short, I believe it could be done in such a way that no one would need regret having taken part."[1]

Vincent reiterates these thoughts in his letters throughout his career, showing that he was a great proponent of disseminating works of art through reproductions.

[1] Vincent van Gogh to his brother Theo, 3 December 1882, The Hague. Letter #290, *Vincent van Gogh: The Letters,* on vangoghletters.org.

When you think about Vincent van Gogh, probably the most characteristic quality of his work, apart from the readily recognized imagery, is his brushwork **(FIG. 6).** The rather three-dimensional, energetic quality of his brushwork that is so characteristic and eternally fascinating and that is the dimension that so far we have not really been able to capture. So far, all the reproductions we've been talking about have been two-dimensional. Eight years ago, in 2007, the museum was approached by Fujifilm in Belgium, which was thinking about developing a process whereby you could reproduce the surface texture of a painting extremely accurately. They had clued into the fact that van Gogh's texture is so rich that he would be the ideal artist to develop this for. So we engaged in a partnership with them, and the whole process was developed in close collaboration with our curators.

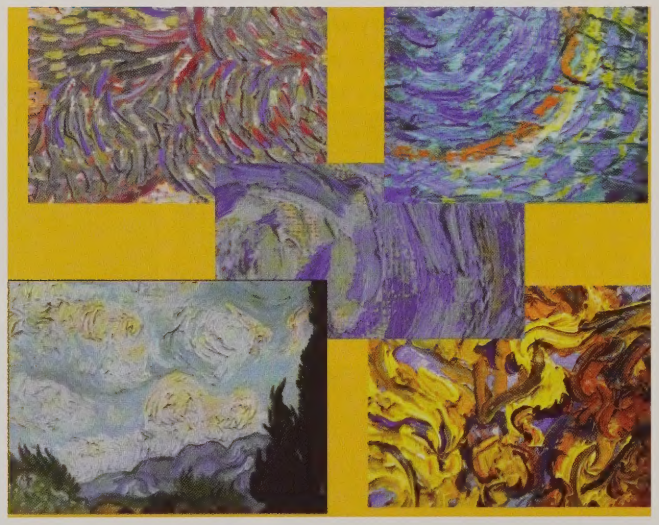

FIGURE 6. Details of van Gogh paintings showing the animated brushstrokes.

FIGURE 7A and **B** shows an example of a Relievo; the lower picture is the original painting and the upper one a photograph of the Relievo reproduction. The original picture has a very rich surface texture, but the reproduction reproduces literally every nook and cranny of it, every crack in the surface, every stain, every deformation, and, of course, the brushwork itself. To the naked eye of the layman, I would say the Relievo is indistinguishable from the original. I should hasten to add though that this is not done with the intent of in any way producing fakes or forgeries. The Relievos are all very clearly identifiable as reproductions. Seals on the back cannot be removed. If you look closely, the seal is immediately visible.

FIGURE 7A (top): A Relievo of Vincent van Gogh's *Wheatfield under Thunderclouds* and **B (bottom):** A detail of the actual painting.

The one thing that we have not quite yet been able to reproduce a hundred percent accurately is the inherent unevenness of the surface sheen of an oil painting. Oil paintings often are varnished; sometime they're not. Often the varnish is patchy; it ages in different ways and different pigments react differently, and that kind of natural patchiness is extremely difficult to reproduce. So the Relievos generally have a slightly more even surface sheen than the original work would have, but it takes an extremely trained eye to recognize that. Thus far, we have developed Relievos for nine works, among them some of the van Gogh icons, including his *Bedroom,* the *Sunflowers,* the *Almond Blossoms,* and two of his horizontal late pictures **(FIG. 8).**

> "... This is not done with the intent of ... producing fakes or forgeries. The Relievos are all very clearly identifiable reproductions. Seals on the back cannot be removed."

Now, briefly, about the process. I will not bore you with too many technical details, partly because it is proprietary information. But, I should add that the process is not in a strict sense 3D printing. Rather,

FIGURE 8. The nine Relievos that have been made of van Gogh paintings.

an extremely high resolution 3D scan of the work is made in our galleries. It has the bi-effect of providing incredibly rich, digital information about the condition of the work, which is interesting for our conservation department. From that scan a mold is made from which an actual size colorless substrate of the picture is produced. So you have the brushstrokes without the actual image on it. Then, in a specially developed printer, Fuji prints a 2D digital image onto the three-dimensional substrate.

"... Fuji [then] prints a 2D digital image onto the three-dimensional substrate."

The trick is that it has to be accurate to the nano-millimeter. We have all seen magazine pictures where the printing process is slightly out of kilter, resulting in a slightly blurred view. That is clearly not what we want. So the match has to be extremely accurate, perfect, and it has taken a long time to achieve that – seven years. Plus, the color image also has to be absolutely perfect. Then each one of the reproductions is quality approved by our museum curators.

The Relievo is mounted onto a canvas, so that it has the feel and flexibility of a real painting. We also reproduce the back of the painting and the stretcher as well, that is to say, all the accretions over time, all the labels that have accumulated on the picture **(FIG. 9).** And then we put the picture in a reproduction of the same frame that we have in the gallery.

FIGURE 9. Detail of the verso of the Relievo of *Wheatfield under Thunderclouds.*

What is the role of these Relievos? I will be blunt with you. It is, in the first instance, strictly commercial. We have long been selling posters and other types of reproductions. Many museums already produce flat 2D reproductions printed onto canvas. This is the next generation. We launched the project in the market last year in Hong Kong as a limited edition, and we are selling the Relievos

for a rather hefty price, namely, $35,000 (USD) apiece. Yes, a sharp intake of breath. I can sense that. For the time being, we consider this to be an extremely high end product. It is the closest you could possibly get to a van Gogh masterpiece. The edition is limited to 260 objects per painting, and the development costs were enormous, so the hope is to recover some of these costs as well.

I have to admit that the project also presents challenges because, with it, we have entered into the high end luxury retail market, and we as a museum don't have that much experience in the high end retail luxury market. We have learned that it is very difficult – and I make no bones about it – to launch a product for which there is no sort of reference, no framework. If you put out a new Chanel handbag, a new Rolex watch, or a new Ferrari, people will immediately have a sense of where that fits in the scheme of things, roughly how much it should cost, and it is an immediately recognized status symbol. But for the Relievos, we actually have to create a market and convince people why they should spend that kind of money, and why it is worth it. So that has been a challenge for us and a steep learning curve.

On the other hand, we also use these Relievos for educational purposes. We have already used fragments of these reproductions in our galleries for their tactility. All our actual paintings are behind glass, so you are never allowed to touch them, but the Relievos give people a sense of what the surface texture is like. They are also great educational tools for visually impaired visitors to the museum, and we are going to use them more extensively in that regard. But we have a very strict policy in our museum that they are not to *replace* any original works in the galleries. We still believe in Walter Benjamin's thoughts about the work of art in the age of mechanical reproduction, that something of the aura is lost through any type of reproduction. This is going to be a sliding scale, however, because the use of facsimiles of works on paper in museums and galleries is by now widely accepted. If you go to the Albertina in Vienna, which has one of the greatest Old Master drawings collections in the world, and you ask to see one of their great Raphael drawings in the Study Room, what they will show you is a facsimile because the works are too fragile for the demand that they are facing. So, we will also be showing some of our very fragile Vincent van Gogh letters as facsimiles in the galleries, and our curators accept that, no discussion. Were I to propose to put the Relievo of the *Sunflowers* in the galleries if the picture were out on loan, I would probably be crucified, but that is a discussion for another day.

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APPLYING U.S. INTELLECTUAL PROPERTY LAW TO 3D PRINTING

JAMES R. KLAIBER*

As an intellectual property attorney, my work involves protecting the work of creators. I am a former research engineer myself, so I come from that side of the creative world.

Intellectual property law as it relates to 3D printing calls for predictions rather than looking at the past, because 3D printing hasn't been around long enough to develop a significant body of case law. But we can compare 3D printing to the way that the law has been applied to other changes in technology and how it has been used in the creative arts.

There are four basic intellectual property rights to discuss that are my focus here[1]:

- patents
- marks (trademarks and service marks)
- copyrights
- trade secrets

Trademarks, to which I'll return, are already an issue in the world of 3D printing. Trade secrets, proprietary processes, are the sorts of things that Axel Rüger was talking about. Apparently, the Van Gogh Museum decided to keep its Relievo process secret. They could have gone after a patent, but it is probably too late to do that now.

PATENT AND COPYRIGHT INFRINGEMENT

Two organizations administer the patent and copyright processes in this country – the U.S. Patent and Trademark Office (USPTO) and the Copyright Office. And there are two basic kinds of patents: utility patents and design patents. Utility patents, which last 20 years from earliest application, affect functional inventions – "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" (35 U.S.C. §§101-103). There are plenty of patents on artistic methods. Design patents, which last 14 years, protect "any new, original and ornamental design for an article of manufacture" (35 U.S.C. §171).

Patent infringement: yes, you can sue people when you have a patent. In fact, that is the way that you exert your rights, which are enforced in federal

* James R. Klaiber, Esq. is a Partner and a registered patent attorney in the Intellectual Property Group at Pryor Cashman, LLP and Chair of the Patent Committee, NYC Bar Association. The author would like to thank Jesse Oppenheim, an Associate in Pryor Cashman's Litigation Group, for his assistance in the preparation of this article.

1 Trademarks, patents, and copyrights have their basis in the U.S Constitution. (see Article I, Section 8, Cl. 3: "The Congress shall have power … to regulate commerce with foreign nations, and among the states … and Article I, Section 8, Cl. 8: The Congress shall have power … To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.")

court. Under Sections A and C of 35 U.S.C. §271, if somebody makes, uses, or sells your patented invention without your authority, you can sue them. Less well known, section B of the same law, is something called contributory infringement, which allows you to sue someone for making components of your patented invention. In the world of 3D printing, this may mean making various components on a 3D printing machine. Components themselves can be the subject of a patent infringement lawsuit.

Copyrights have a bit thinner protection. While Patents cover the way things work and are set up, Copyrights protect only expression. Moreover, copyright laws in the United States specifically exempt things that are covered by patents, like ideas, procedures, processes, and so on, which is known as the "useful article doctrine." Unlike patents, copyright rights are acquired pretty much automatically, the minute that you fix whatever it is that you are doing in some tangible form in a tangible medium of expression. Patent examinations are more complicated and may take years. Copyright registration is not a particularly formal process, but there are legal advantages to registering a copyright, in that statutory damages and attorneys' fees will then be available to the copyright owner in court actions (17 U.S.C. §412), so I certainly encourage people to register.

So, as with patents, a copyright infringement action can be brought in federal court. One of the rights of a copyright holder is to reproduce derivative works, mashups, such as we saw produced in the MetropolitanMuseum's MediaLab. Those are derivative works. All of those rights are potentially at issue here.

TRADEMARKS

Trademarks are probably the least important from an artistic standpoint, although they are sometimes worked into works of art. In fact, one of my firm's clients is a musician who named one of his albums after a popular cold remedy, and he got a pretty nasty letter from the drug company, demanding he change the cover art.

Registration of trademarks is what makes them so powerful. They, too, are enforced in federal court, and after a certain amount of time, become incontestable. You can register any word, name, symbol or device in commerce to identify and distinguish your goods from others, and can "stop others from using in commerce a registered mark or a non-registered mark in connection with goods or services where such use is likely to cause confusion, or to cause mistake, or to deceive ..." (15 U.S.C. §§1114 (a) and 1125(a)).

TRADE SECRETS

Trade secrets refer to proprietary processes, such as the Relievos at the Van Gogh Museum. If you invent something but you don't feel like seeking patent protection, you can keep it secret. The trade secret law basically says that if you take commercially reasonable steps to protect something that has commercial value, and somebody steals it, you can go after them for infringing your trade secret rights. Some examples of trade secrets are the recipe for Coca Cola, KFC's 11 Herbs and Spices, and the Google search algorithm.

What is most important with respect to 3D printing is that the manufacturing specifications of a file that you create for a 3D print can remain a trade secret until you put it up online. So if somebody gets a hold of that file and surreptitiously makes a 3D print, you could go after them. The Uniform Trade Secrets Act (UTSA) – a model law promulgated by the Uniform Law Commissioners – has been adopted in virtually all of the states in the U.S.[2] Congress is currently considering the idea of having a Federal trade secret right, but typically trade secret claims are brought in state court.

PUTTING IT ALL TOGETHER

Let me give you an example of how these rights work. Jesse Oppenheim, my colleague at Pryor Cashman, invented the idea of an improved wine

2 New York, Massachusetts and North Carolina are exceptions and rely on "common law."

FIGURE 1. A sketch of "Blass Knuckles"- a wine glass improvement designed by Jesse Oppenheim

glass **(FIG. 1),** by combining a wine glass with brass knuckles (which he calls "Blass Knuckles"). It is a functional object. You can grab onto the wine glass a lot better with Blass Knuckles, and your fingers do not heat the liquid. This is a functional improvement, so it is patentable. The shape of the "Blass Knuckles" product also is new, original and decorative, so a design patent may also be possible. Keep in mind that for patent infringement it does not matter whether somebody comes up with similar inventions or designs independently. If they come up with it after your patent is issued, you could go after them for infringement. There is no knowledge of wrongdoing – or *scienter* – requirement.

"What is most important with respect to 3D printing is that the manufacturing specifications of a file that you create for a 3D print become a trade secret until you put it online."

Copyright is a bit different. If there were some sort of decorative pattern embossed on the wine glass, that pattern could be copyrightable. Also, the method of making the wine glass – the design file – or the manufacturing specifications might be copyrightable. So there are some potential copyright rights in the wine glass as well. But if a possible infringer could show he/she came up with the idea independently, he could get away with it. And, of course, trademark protection would cover the name "Blass Knuckles."

Finally, if we had a manufacturing file for the Blass Knuckles product and one of our staff stole that information in order to compete against us, that would be a trade secret violation.

CASE LAW

How many actual legal cases have involved 3D printing? Very few, but they are interesting.

A company called nuPROTO came up with a "Game of Thrones" 3D-printed smartphone dock inspired by the cable show's distinctive "Iron Throne."[3] **(FIG. 2)** It sounds like a great idea until you realize that they weren't licensed by HBO. So, in February 2013, nuPROTO's co-founder got a cease-and-desist letter from HBO, saying it had to stop producing the Iron Throne Dock and offering them for sale, and it had to return the money to the people who had ordered them. That, in fact, is what happens when somebody who has these rights goes after you.

FIGURE 2. 3-D printed "Iron Throne Dock" whose producer received a cease-and-desist letter from HBO.

In another recent case, *Inhale v. Starbuzz,* an actual lawsuit,[4] Starbuzz Tobacco was making 3D-printed versions of Inhale's "hookah" (tobacco smoking device). They were the same shape as the water container of Inhale's hookah, which Inhale had copyrighted in 2011, but they did not include Inhale's embossed skull and bones logo. Inhale tried to shut Starbuzz down on copyright grounds, but the judge said "no," reasoning that because the shape of the water container is functional (a "useful article") and not

3 For images and details, see Jim Edwards, "Here's the 3D-Printed 'Game of Thrones' Phone Dock that's Banned by HBO," in *Business Insider,* August 13, 2013.

4 *Inhale v. Starbuzz Tobacco, Inc.,* no. 11-cv-03838-ODW-FFM (C.D. Cal. 2011), *aff'd by* 739 F.3d 446 (9th Cir. 2014), *petition for cert, filed* (U.S. Oct. 6, 2014) (no. 14-396).

independent of the container's utilitarian function — to hold the contents within its shape …" it is not protected by copyright. Copyright only covered the skull and crossbones, and guess what, Starbuzz wasn't using the skull and crossbones.

CONCLUSION

So where are we going with this? We have heard that the processes involved in 3D printing aren't simply push and print, but we are moving more and more in that direction. Once the bugs are worked out on these machines and the price is down, it is going to be like other technologies. Think of what happened in the world of music. Suddenly, music became cheap to copy and share, and the result is that it is now easier to purchase legitimately and not have to worry about infringing. Sites like Thingiverse, where people put files up and charge a small fee, will make it a lot easier to get the original file, rather than to do your own scanning. While many people may have 3D printers, accurate 3D scanners are not something that most people can afford. So the sites that make 3D printing files available for works that are owned and controlled are likely to be targeted as infringers, as had happened with MP3s and music—think of Napster.

"In February 2013, nuPROTO's co-founder got a cease-and-desist letter from HBO, saying it had to stop producing the [3D-printed] Iron Throne Dock … and it had to return the money to the people who had ordered them."

But, it seems to me that people are going to make the licenses easier to get. At least that is my hope. Let's say you just want your three-year-old to play with something and stop crying. When 3D printers become cheap enough, and licenses are reasonably accessible, it will be a lot easier to punch in the file for a toy and have it pop out in 15 minutes. You don't need a great deal of precision, and there could potentially be an infinity of toys to choose from. It's simple everyday uses like this that I think will drive the adoption of 3D printing.

• • •

HOLD THE DATE for our next *IFAR EVENING*

Tuesday, January 27th 6:00 – 8:00 pm.

The Leonard A. Lauder Cubist Collection:
A Conversation with Emily Braun and Pepe Karmel

Emily Braun, Distinguished Professor
Hunter College and the Graduate Center, C.U.N.Y.,
and Curator, the Leonard A. Lauder Collection

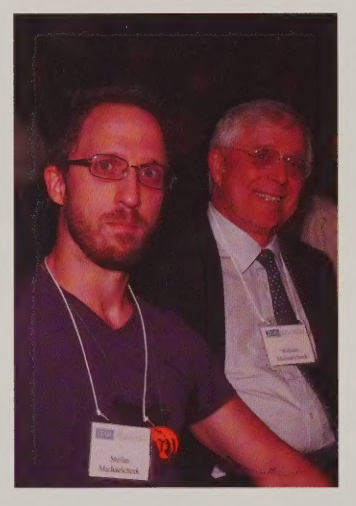
Pepe Karmel, Associate Professor
Department of Art History, New York University;
author of *Picasso and the Invention of Cubism*

SCENES FROM AN IFAR EVENING

Jordan Stein (left) and Frederick Elghanayan.

David Brown, Eileen Costello, and Herbert Hirsch, IFAR Law Advisory Council member.

Christiane Fischer, IFAR Board member.



Stefan (foreground) and William Michaelcheck.

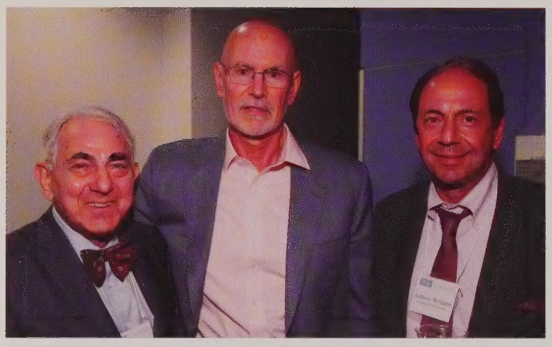
Renée Price.

Brenda Coleman (left) and Vivian Ebersman.

Judith Gurland (left) and Nancy Schwartz.

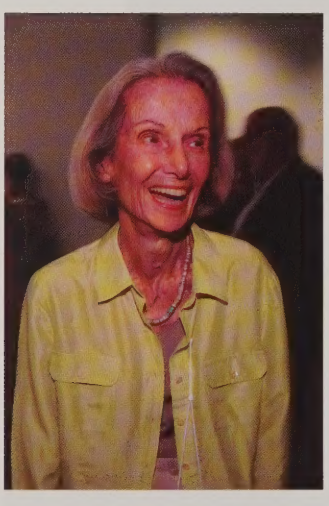
Credit for these photos and all other images of speakers and guests at this program: Steven Tucker.

CONT.



Left to right: Aaron Milrad, IFAR Board member; Alex Friedman; and Anthony Williams, IFAR Board Chairman.

Gary Cosimini, Elizabeth Marcus, and Jane Kallir.

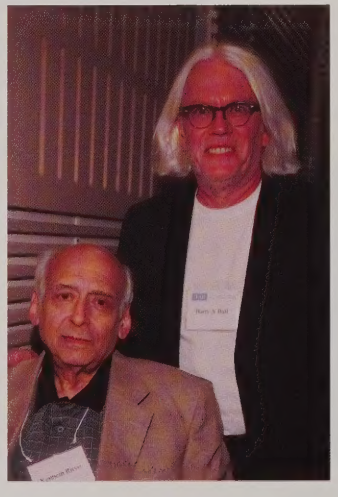


Priscilla Muller, IFAR Art Advisory Council member.

Left to right: Ana-Alicia Sigueiros; Kathry Moldenhauer; Laren Snetiker, and Linda Selvin.

Nancy Harrison.

Virgilia Klein, IFAR Board member (left) and Diane Burke.



Kenneth Ritvo (seated) and Barry X Ball.

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The photo of each item is accompanied by a brief description of the work, the ALR catalogue number, if registered, and the date and place of theft. An asterisk before the catalogue number means that a photograph of the stolen work is available, although not necessarily included in this issue.

Anyone wishing additional information should contact the ALR at 44.207.841.5780. From the U.S., add the prefix 011.

Stolen Art Alert® is the registered trademark of the International Foundation for Art Research, Inc.

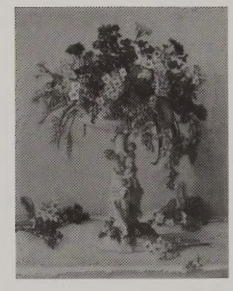
STOLEN ART*

PAINTINGS

54. **ALENE SIROTT-COPE** (American, contemporary). ***Ocean Scene.*** 17.78 x 17.78 cm (7" x 7"). *L14.682. Stolen from a library in Hollis, NH on June 8, 2014.

54

55. **JOHN ERNEST FOSTER** (English, 1877-1965). ***Flower Painting with Ornamental Stand,*** 1954. Oil on canvas. *L14. 595. Stolen from a church in Essex, England on January 1, 2004.



55

56. **SAM FRANCIS** (American, 1923-1994). ***Untitled,*** 1994. Oil on canvas. 46 x 61.01 cm (approx. 18 ¼" x 24"). *L14.270. Stolen from a gallery in Toulouse, France on August 27, 2013.

56

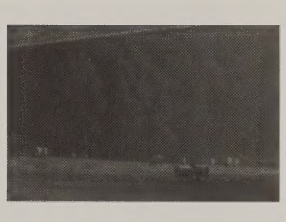
57. **H. GARNIER** (French, 19th century). ***Doge's Palace, Venice, Italy.*** Oil on panel. 19.05 x 31.75 cm (7 ½" x 12 ½"). Signed l/r and verso. *L14.575. Stolen from an antiques mall in Denver, PA on April 23, 2014.

57

58. **GUERCINO (GIOVANNI FRANCESCO BARBIERI)** (Italian, 1591-1666). ***The Madonna with Saints John the Evangelist and Gregory the Wonderworker,*** 1639. See photo on inside back cover.

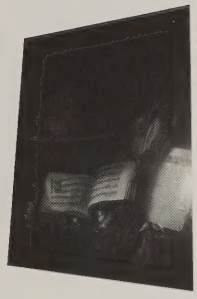
**Numbering for the year 2014 Cumulative Index of Stolen Art began with the last issue, Vol. 15, no. 2.*

STOLEN ART (cont.)



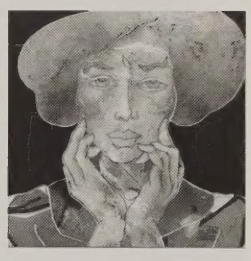
59

59. **PAUL JAMES** (English, contemporary). ***Autumn Morning,*** 2004. 75.01 x 150.01 cm (approx. 29 ½" x 59"). *L14.910. Stolen from a business in New York, NY on March 15, 2013.



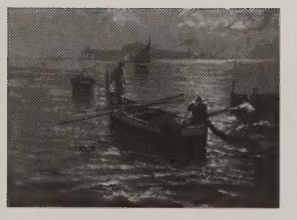
60

60. **CHRISTIAN LUYCKS** (Flemish, 1623- after 1657). ***Still Life.*** Oil on canvas. 99.06 x 72.39 cm (approx. 39" x 28 1/2"). *L14.975. Stolen from a private residence in Bruern, England on September 3, 2014.



61

61. **GIOVANNI MARANGHI** (Italian, born 1955). ***La tua bocca squisita.*** Oil on canvas. 72.01 x 72.01 cm (approx. 28 ¼" x 28 ¼"). Signed l/r. *L14.1006. Stolen from a private residence in Berlin, Germany on September 9, 2014.



62

62. **LAZZARO PASINI** (Italian, 1861-1949). ***Mediterranean Coastal Scene.*** 27 x 37.01 cm (approx. 10 ¾" x 14 ½"). *L14.624. One of two paintings stolen from a private residence in Falmouth, England on May 13, 2014.

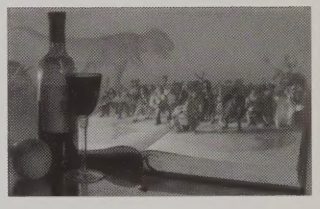
63

63. **Unknown Artist.** ***Our Lady of Good Counsel – Mother of Good Council,*** 1800-1830. Oil on canvas. 77.01 x 61.01 cm (approx. 30 ¼" x 24"). *L14.1085. Part of an altarpiece. Stolen from a parish church in Breitenfeld in Vienna, Austria on October 7, 2014.

64. **Unknown Artist** (Italian, 15th century). ***Untitled painting.*** 25 x 25 cm (approx. 9 ¾" x 9 ¾"). Stolen from the picture gallery of the Sforza Castle, Milan, Italy on August 23, 2014.

64

65. **CONOR WALTON** (Irish, born 1970). ***Here be Monsters,*** 2014. Oil on linen. 38.1 x 60.96 cm (approx. 15" x 24"). Signed u/r. Dated u/l. *L14.1053. Stolen from a gallery in San Francisco, CA on September 21, 2014.



65

66. **DAVID ZERMENO** (American, contemporary). ***Self Portrait in Paris.*** Oil on canvas. 10.16 x 10.16 cm (approx. 4" x 4"). *L14.879. Stolen from a private residence in Boston, MA on June 1, 2008.

66

The following two paintings were stolen from a municipal office in Vienna, Austria on March 25, 2013. *L14.1027:

67

67. **THEODORE BREITWIESER** (Austrian, 1847-1930). ***Horse Dealers on the Trip,*** 1880. Oil on wood. 17.5 x 27.51 cm (approx. 7" x 10 ¾").

68. **KARL ROUX** (German, 1826-1894). ***Cow in a Landscape,*** 1850. Oil on wood. 23.7 x 29.29 cm (approx. 9 ¼" x 11 ½").

68

STOLEN ART (cont.)

69

70

The following two paintings by **JEROME BUSHYHEAD** (American Indian – Cheyenne Tribe, 1929-2000) were stolen from private premises in Bakersfield, CA on October 5, 2012. *L14.931:

69. ***Indian with Eye Mask.*** Signed l/l. 91.44 x 60.96 cm (approx. 36" x 24").

70. ***White Man,*** 1985. Acrylic. 91.44 x 60.96 cm (approx. 36" x 24").

71

73

The following three paintings by **NORBERT JOSEPH CARL GRUND** (Bohemian, 1717-1767) were stolen from a private residence in Munich, Germany on June 6, 2014. *L14.681:

71. ***River Landscape with a Tower and Approaching Thunderstorm,*** 1750. Oil on panel. 21.79 x 28.5 cm (approx. 8 ½" x 11 ¼").

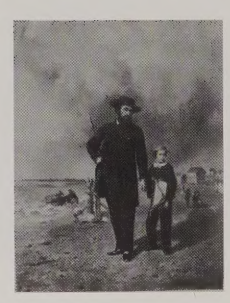
72. ***A Gentleman Listening to the Lute Playing of a Lady,*** 1750. See photo on inside back cover.

73. ***Winter Landscape with a Sleigh,*** 1750. Oil on panel. 19 x 26.01 cm (approx. 7 ½" x 10 ¼").

STOLEN ART ALERT®

The following three paintings were stolen from a private residence in Kemerton, England on August 12, 2014. *L14.912:

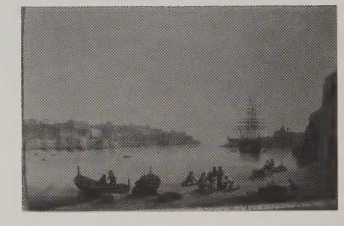
74. **W. S. P. HENDERSON** (British, 1836-1874). ***An Afternoon Stroll along Brighton Beach,*** 1864. Oil. 76.2 x 63.4 cm (approx. 30" x 25").



74

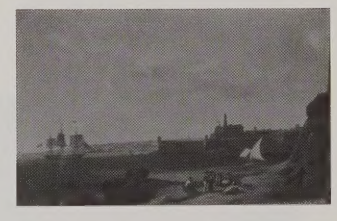
GIOVANNI SCHRANZ (Maltese, 1794-1882).

75. ***Grand Harbour Malta.*** Oil. 41.28 x 64.14 cm (approx. 16 ¼" x 25 ¼").



75

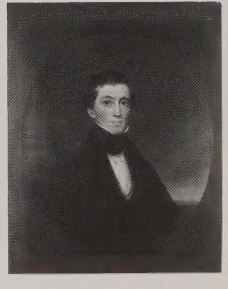
76. ***Grand Harbour Valetta.*** Oil. 41.28 x 64.14 cm (approx. 16 ¼" x 25 ¼").



76

The following two paintings by **GEORGE LINEN** (English, 1802-1888), stolen in Boston, MA in September 1983 and originally reported in IFAR's *Stolen Art Alert,* December 1983, nos. 1150-51, are still missing. *83.421.1:

77. ***Portrait of John Gardiner Gibson,*** (1799-1838), 1839. Oil on panel. 10" x 8". Signed.



77

78. ***Portrait of Mrs. John Gardiner Gibson,*** (1804-1888), 1839. Oil on panel. 10" x 8". Signed.

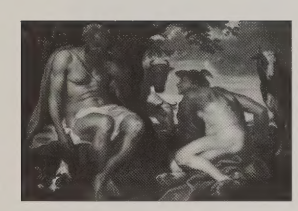
78

STOLEN ART (cont.)

The following three paintings were among 71 works stolen from a private residence in Vienna, Austria on August 19, 2014. See also item no. 89. *L14.971:

79

79. **MARIE EGNER** (Austrian, 1850-1940). ***Wheat Field with Martel.*** Oil on panel. 43.51 x 54.51 cm (approx. 17 ¼" x 21 ½").



80

80. **JACOB JORDAENS** (Flemish, 1593-1678). ***Mercury and Argus.*** Oil on canvas. 102.01 x 151 cm (approx. 40 ¼" x 59 ½").

81

81. **FRIEDRICH LOOS** (Austrian, 1797-1890). ***Unterberg,*** 1832. Oil on board. 22.7 x 31.8 cm (approx. 9" x 12 ½").

MINIATURES

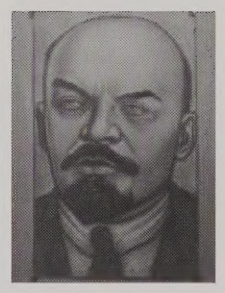
82

82. **GEORGE M. BRIGHTY** (English, 1788-1888). ***Masonic Jewel of Apollo,*** 1816. Enamel on ivory. 2.74 x 2.74 cm (approx. 1" x 1"). Engraved: Presented to the lodge of the Nine Muses by Brother George Michael Brighty J.W. as a testimony of regard 22nd November 1816. *L14.746. Stolen from a Masonic hall in Hampshire, England on June 10, 2014.

WORKS ON PAPER

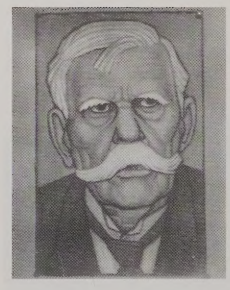
The following two works by **DIEGO RIVERA** (Mexican, 1886-1957) were stolen in Gloucestershire, England around January 1, 1960. *L14.1099:

83. ***Preparatory Sketch of Lenin,*** c. 1930-1933. Ink on paper. 30 x 19.99 cm (approx. 11 ¾" x 7 ¾").



83

84. ***Preparatory Sketch of Unknown Revolutionary Figure,*** c. 1928-1934. Ink on paper. 30 x 19.99 cm (approx. 11 ¾" x 7 ¾").



84

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85. **ERNESTO CAIVANO** (Spanish, born 1972). ***Floral Veins and Conduits 41,*** 2006. Ink and graphite on paper. 23.8 x 16.21 cm (approx. 9 ½" x 6 ½"). Signed center u/l. *L14.694. Stolen from a New York City hospital on April 29, 2014.

85

86. **EDGAR DEGAS** (?) (French, 1834-1917). ***Ballet Dancer Adjusting her Slipper,*** 1870. Pastel(?). 46 x 61.01 cm (approx. 18 ¼" x 24"). *L14.1057. Stolen from a private residence in Apesia, Cyprus on September 29, 2014.

86

87. **MAYNARD DIXON** (American, 1875-1946). ***Untitled (Stagecoach Attack).*** See photo on inside back cover.

STOLEN ART ALERT®

STOLEN ART (cont.)

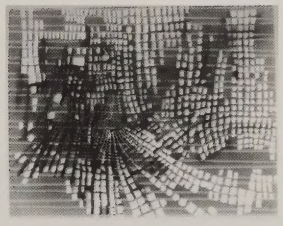
88

88. **XU JIANGUO** (Chinese, contemporary). ***Abstract in Blue,*** c. 1980-2000. Ink on rice paper. 180.01 x 619.99 cm (approx. 70 ¾" x 244"). *L14.706. Stolen after an exhibition in March 2011 in Shanghai, China.

89

89. **OSKAR KOKOSCHKA** (Austrian, 1886-1980), ***Gypsy Girl,*** 1901. Watercolor on paper. 29.5 x 22.5 cm (approx. 11 ½" x 8 ¾"). Signed and dated l/l. *L14.971. Stolen from a private residence in Vienna, Austria on August 27, 2014. See also item nos. 79-81.

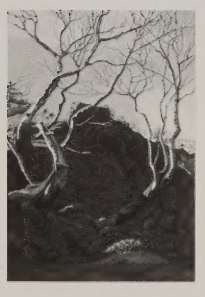
90. **PAVEL TCHELITCHEW** (Russian, 1898-1957). ***Four Female Figures under a Tree,*** 1929. See photo on inside back cover.



91

91. **MARIA HELENA VIEIRA DA SILVA** (Portuguese-French, 1908-1992). ***La Route Blanche,*** 1952. Gouache on cardboard. 35 x 42.01 cm (approx. 13 ¾" x 16 ½"). *L14.985. Stolen from a private residence in Paris, France on July 13, 2014.

92



93

The following two works by **ROS HARVEY** (Irish, contemporary) were stolen from a gallery in Malin, Ireland on July 12, 2014. *L14.840:

92. ***Burning the Whins,*** 2013. Pastel. 121.92 x 88.9 cm (48" x 35").

93. ***In the Glen,*** 2013. Pastel. 121.92 x 88.9 cm (48" x 35").

STOLEN ART ALERT®

The following two works were stolen from a conference center in Hamburg, Germany on December 28, 2012. See also item no. 101 below. *L14.779:

94. **MARTHA DIAMOND** (American, born 1944). ***Harbor,*** 1981. Ink on paper. 61.49 x 37.21 cm (approx. 24 ¼" x 14 ½"). Signed l/l.

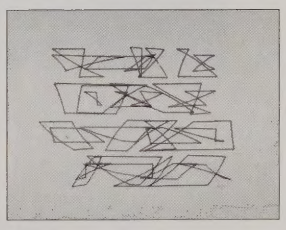
94

95. **KARL HORST HÖDICKE** (German, born 1938). ***Distant Shores,*** 1982. Gouache and dispersion on paper. 98.5 x 68.5 cm (approx. 38 ¾" x 27").

95

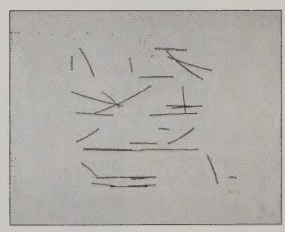
The following two works by **VERA MOLNAR** (Hungarian, born 1924), part of a series called "10 trapezes," were stolen from a gallery in Berlin, Germany on March 15, 2013. *L14.770:

96. ***Trapezes, Potterdrawings,*** 1975. Ink on paper. 30 x 23.01 cm (approx. 11 ¾" x 9"). Signed l/r. Ed. no. 1 of 10.



96

97. ***Trapezes, Potterdrawings,*** 1975. Ink on paper. 30 x 23.01 cm (approx. 11 ¾" x 9"). Signed l/r. Ed. no. 2 of 10.

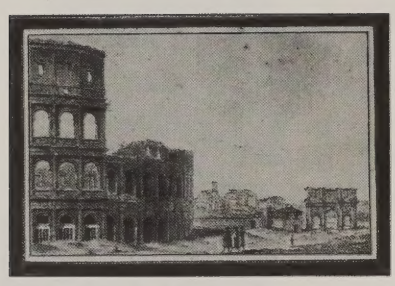


97

STOLEN ART ALERT®

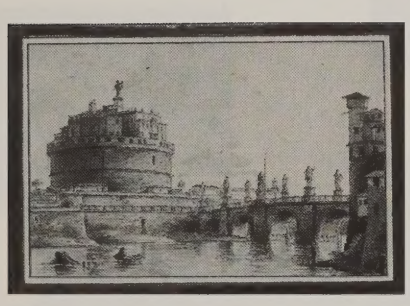
STOLEN ART (cont.)

The following three works on paper by **VICTOR-JEAN NICOLLE** (French, 1754-1826) were stolen from a New York gallery on August 25, 2014. *L14.996:



98

98. ***The Colosseum and the Arch of Constantine in Rome.*** Black and brown ink and watercolor over preliminary indications in black chalk on cream laid paper. 44 x 69 mm (1 ¾" x 2 ¹¹⁄₁₆"). With ruled borders in brown ink; original mount; original frame. Inscribed by the artist on the verso: Vue du Coliseum et de l'arc de Constante à Rome.



99

99. ***Castel Sant'Angelo and the Ponte Sant' Angelo as seen from the Tiber River in Rome.*** Black and brown ink and watercolor over preliminary indications in black chalk on cream laid paper. 44 x 69 mm (1 ¾" x 2 ¹¹⁄₁₆"). With ruled borders in brown ink; original mount; original frame. Inscribed by the artist on the verso: Vue du château et pont Stange Sante Tibra à Rome.

100

100. ***The Ruins of the Basilica of Nerva and the Temple of Pallas in Rome.*** Black and brown ink and watercolor over preliminary indications in graphite and black chalk on cream laid paper. With a double border in brown ink; original mount. 73 mm diameter (2 ⅞"). Inscribed by the artist in black ink on the lower center of the recto of the mount of the first: Vue des Ruines de la Basilique du Forum de Nerva et du Temple de Pallas à Rome.

STOLEN ART ALERT®

PRINTS, LITHOGRAPHS

101. **JÖRG IMMENDORFF** (German, 1945-2007). ***Dialectic of the Gods.*** Woodcut on laid paper. 80.01 x 59.99 cm (approx. 31 ½" x 23 ½"). Signed l/r. *L14.779. Stolen from a conference center in Hamburg, Germany on December 28, 2012. See item nos. 94-95 above.

101

The following six prints by **WERNER DREWES** (German/American, 1899-1985) were stolen from a gallery in Los Angeles, CA on March 15, 2014. *L14.572:

102. ***Ancient Warrior,*** 1945. Color woodcut. 24.13 x 31.75 (approx. 9 ½" x 12 ½").

102

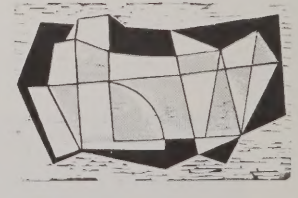
103. ***Apparition,*** 1945. Color woodcut. 23.18 x 31.09 cm (approx. 9" x 12 ¼"). Proof 1/30.

103

104. ***Black Curve on Yellow,*** 1938. Color woodcut. 12.83 x 20.32 cm (approx. 5" x 8") Proof 3.

104

105. ***Crystallic Form,*** 1943. Color woodcut. 25.08 x 39.69 cm (approx. 10" x 15.5"). Proof 4.



105

106. ***Opposed,*** 1945. Color woodcut. 23.02 x 38.42 cm (approx. 9" x 15"). Proof 1/20.

106

107. ***Beginning Motion,*** 1943. Color woodcut. 29.84 x 38.74 cm (approx. 11 ¾" x 15 ¼"). Proof 2.

107

STOLEN ART ALERT®

STOLEN ART (cont.)

PHOTOGRAPHS

108

108. **GERED MANKOWITZ** (English, born 1946). ***Jimi Classic, 2009.*** Photograph print on silver gelatin paper from a 1967 photo. 44.45 x 44.45 (approx. 17 ½" x 17 ½"). Ed. no. 47/50. *L14.526. Stolen from a gallery in Daventry, England on February 8, 2014.

109. **STEVE MCCURRY** (American, born 1950). ***Afghan Girl Mosaic,*** 2010. See photo on inside back cover.

SCULPTURE

110

111

The following two items were stolen from a storage unit in Omaha, NE on March 24, 2014. *L14.502:

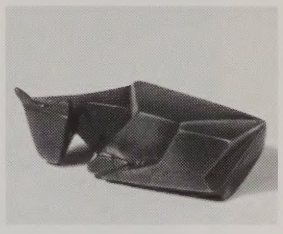
110. **PAUL BUSSE** (American, contemporary). ***Miniature replica of Omaha High School.*** Wood.

111. **RICHARD YOST** (American, contemporary). ***17 License Plate Birdhouses.*** Metal and wood.

STOLEN ART ALERT®

The following two items by **EWALD MATARÉ** (German, 1887-1965) were stolen from a warehouse in Cologne, Germany on September 4, 2014. *L14.1000:

112. ***Mathematik-Kuh I,*** c. 1965. Bronze. 4.39 x 11 cm (approx. 1 ¾" x 4 ¼"). With a monogram on the underside. Cat. rais. 297a.



112

113. ***Stehende Kuh "Zinkkuh,"*** c. 1965. Bronze. 8.51 x 12.5 cm (approx. 3 ¼" x 5"). With a monogram on the underside. Cat. rais. 150b.

113

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114. **ERNST BARLACH** (German, 1870-1938). ***Kussgruppe II,*** 1921. See photo on inside back cover.

115. **RICHARD COOPER & COMPANY** (English, contemporary). ***The Charge,*** 2000. Bronze. 13 x 16.51 cm (approx. 5 ¼" x 6 ½"). Ed. no. 11/95. *L14.8000. Stolen in Norwich, England on July 6, 2014.

115

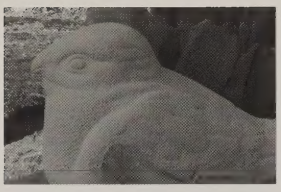
116. **HAVARD HOMSTVEDT** (Norwegian, born 1976). ***Untitled,*** 2008. Bronze with a patina. 11.99 x 15.49 cm (approx. 4 ¾" x 6"). *L14.617. Stolen from a gallery in Oslo, Norway on April 8, 2014.

116

117. **HOLGER LASSEN** (German, born 1965). ***Grosse Traeumende,*** 2011. Bronze. 170 x 100 cm (approx. 67" x 39 ¼"). Ed. no. 2. *L14.695. Stolen from a private residence in Como, Italy on March 16, 2014.

117

STOLEN ART (cont.)



118

118. **RICHARD PERRY** (English, contemporary). ***Nightjar Sculpture,*** 2013. (shown: detail) Portland stone. *L14.849. Stolen in Lindford, Hampshire, England from "Shipwrights Way," a path across Hampshire, on July 4, 2014.

119

119. **BARTHÉLEMY PRIEUR** (French, 1526-1611). ***Peasant,*** c. 1600. Bronze on an ebonized base. 32.99 x 5 cm (approx. 12" x 2"). *L14.1061. Stolen from a private residence in London, England on December 12, 2012.

120

120. **JO SECCOMBE** (Irish, contemporary). ***Artemis.*** Bronze. 37.01 x 18.01 cm (approx. 14 ½" x 7"). Marked with ed. no. 2/10 and sculptor's initials: JFS. *L14.896. Stolen from an exhibition in Hertfordshire, England on August 4, 1990.

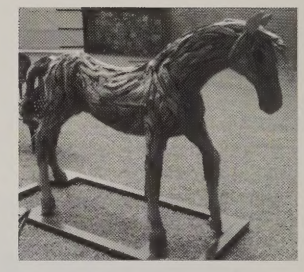
121

121. **JAN SWEENEY** (English, contemporary). ***March Hares – 'Another Spring',*** c. 2000. Bronze. 19.99 x 8 cm (approx. 7 ¾" x 3 ¼"). Signature and ed. no. 1/12 on the base. *L14.928. Stolen from a private residence in Harrington, England on August 18, 2014.

122

122. **GUSTAVO TORRES** (Mexican, born 1967). ***Small Female Study,*** 2014. Bronze. 21.59 x 2.54 cm (8 ½" x 1"). Signed and numbered 6/75 on the base. Gallery inv. no. c.25369. *L14.1052. Stolen from a gallery in San Francisco, CA on September 14, 2014.

123. **Unknown Artist** (Indonesian, contemporary). ***Horse,*** 2014. Teak root. 180.01 x 70 cm (approx. 70 ¾" x 27 ½"). *L14.979. Stolen from a furniture store in Norfolk, England on September 11, 2014.



123

SILVER

124. **PABLO PICASSO** (Spanish, 1881-1973). ***Visage aux Mains,*** 1956. Diam: 41.91 cm (16 ½"). Ed. no. 16/20. *L14.1266. Stolen from the wall of the Leslie Smith Gallery booth at the Art Miami art show in Miami, FL on December 5, 2014. Art Miami is offering a $5,000 reward.

124

PRE-COLUMBIAN ART

125. **Unknown Artist** (Tairona, 800-1400 AD). ***Cacique, Standing Naked Shaman.*** Gold alloy. 9.5 x 10.01 cm (approx. 3 ¾" x 4"). *L14.752. Stolen from an art fair in London, England on June 27, 2014.

125

INDIAN ART

126. **Unknown Artist** (Indian, 750-1200 BC). ***Buddha in Dhyana Mudra.*** Black basalt. 96.52 x 60.96 cm (38" x 24"). *L14.760. Stolen from a public space in Bihar, India on May 14, 2014.

126

TEXTILES

127. **KAREN CIARAMELLA** (American, contemporary). ***Centered,*** 2007. Wool roving. 172.72 x 121.92 cm (68" x 48"). *L14.893. Stolen in transit between Minneapolis, MN and Moonachie, NJ on January 14, 2014.

127

STOLEN ART ALERT®

MISSING ART*

PAINTINGS

12

12. **PHILIP TSIARAS** (Greek, contemporary). ***Tibet Head.*** Oil on canvas. 70 x 70 cm (approx. 27 ½" x 27 ½"). *L14.607. Missing in transit in Athens, Greece on April 24, 2014.

The following paintings were missing in Athens, Greece on March 15, 2014. *L14.796:

13

13. **NIKOS HADJIKYRIAKOS-GHIKA** (Greek, 1906-1994). ***Hydra Island Steps,*** 1966. Oil on canvas. 54.99 x 32.99 cm (approx. 21 ½" x 13").

14

14. **IOANNIS MORALIS** (Greek, 1916-2009). ***Geometric Embrace,*** 1975. Oil on canvas. 97 x 167 cm (approx. 38 ¼" x 65 ¾"). Signed and dated l/l: I Moralis, Aigina, Jul-Aug 1975.

MIXED MEDIA

15

15. **NIKOS HADJIKYRIAKOS-GHIKA** (Greek, 1906-1994). ***Selfridges,*** 1961. Collage. 89.99 x 70 cm (approx. 35 ½" x 27 ½"). *L14.796. Missing in Athens, Greece on March 15, 2014.

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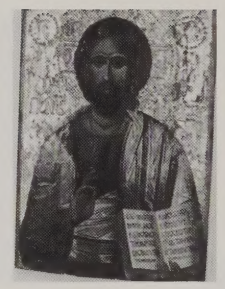
*Numbering for the year 2014 Cumulative Index of Missing Art began with the last issue, Vol. 15, no. 2.

ICONS

16. **Unknown Artist** (Greek, 17th century). ***Pantokrator Christ.*** Icon. Egg tempera on panel. 78 x 54.99 cm (approx. 30 ¾" x 21 ½"). *L14.796. Missing in Athens, Greece on March 15, 2014.



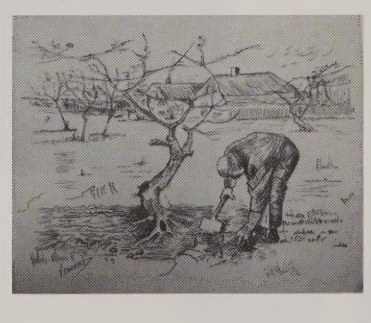
16

WORKS ON PAPER

17. **THIERRY GUETTA** (French, contemporary). ***Mickey Mouse,*** 2013. Mixed media and stencil on paper. 40.64 x 40.64 cm (16" x 16"). *L14.905. Missing in transit between London, England and California on August 5, 2014.

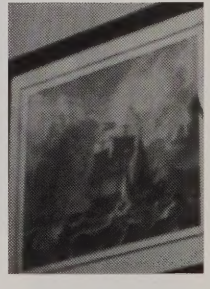
17

18. **VINCENT VAN GOGH** (Dutch, 1853-1890). ***Gardener Near Twisted Apple Tree,*** 1883. Ink and reed pen over pencil. 24.99 x 32 cm (approx. 9 ¾" x 12 ½"). Signed "Vincent." With a watermark. *L14.1093. Missing from a New York gallery on October 8, 2014.



18

19. **UNKNOWN ARTIST** (English, 18th century). ***Ships in a Storm.*** Watercolor. 45.01 x 70 cm (approx. 17 ¾" x 27 ½"). *L14.1109. Missing in transit in Bolivia, NC on June 10, 2014.



19

STOLEN ART ALERT®

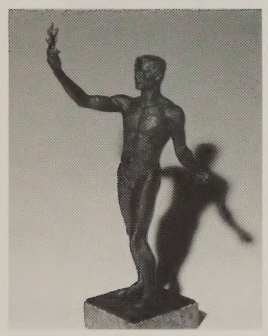
MISSING ART (cont.)

PRINTS

20

20. **FRANCIS BACON** (Irish, 1909-1992). ***Portrait Pope Innocent X.*** Print on paper. 105.99 x 76 cm (approx. 41 ¾" x 30"). Ed. no. 46/60. *L14.796. Missing in Athens, Greece on March 15, 2014.

SCULPTURE



21

21. **OTTMAR OBERMAIER** (German, 1883-1958). ***Der Sieger,*** 1942. Bronze. 62.99 x 14 cm (approx. 23 ¾" x 5 ½"). Signed: O. Obermaier. Foundry mark: Priessman Bauer & Co. Munchen. *L14.576. Missing in transit in Hilversum, The Netherlands on April 10, 2014.

22

The following two works by **IOANNIS MORALIS** (Greek, 1916-2009) were missing in Athens, Greece on March 15, 2014. *L14.796:

22. ***Geometric Figure.*** Brass. 24.99 x 16.651 cm (approx. 9 ¾" x 6 ½"). Ed. no. 3/60.

23

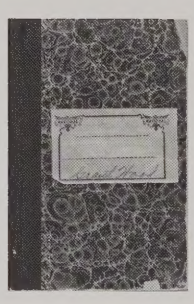
23. ***Reclining Female,*** 1987. Brass. 13.51 x 25.5 cm (approx. 5 ¼" x 10"). Ed. no. 54/60.

STOLEN ART ALERT®

RECOVERED ART*

WORKS ON PAPER

16A. and 16B. **GRANT WOOD** (American, 1891-1942). ***Notebook containing sketches for a stained-glass window at the Veterans Memorial Building in Cedar Rapids, Iowa,*** c. 1920s. 48 pages total. Stolen nearly 50 years ago from the Figge Art Museum (then called the Davenport Municipal Art Gallery) in Davenport, Iowa. Recovered after it was consigned for auction in Chicago, IL in 2013. The notebook was part of a collection of Wood material that the museum bought from the artist's sister in 1964. Shown: the front cover of the notebook and a page with ***Sketch of Allegorical Robed Figure in Profile.***



16A.

16B.

PRINTS, LITHOS

17. **JOHN PIPER** (English, 1903-1992). ***Harlaxton through Gate,*** 1977. Screenprint. 71 x 53 cm (approx. 28" x 21"). *L96.2100. R1691. Stolen from a gallery in London, England in April 1996. Recovered with the help of the ALR in London in October 2014.

17

*Numbering for the year 2014 Cumulative Index of Recovered Art began with the last issue, Vol. 15, no. 2.

STOLEN ART ALERT®

SCULPTURE

18

18. **NAGAI KOZAN** (Japanese, 20th century). ***Okimono (Pekingese Dog),*** c. 1900. Ivory. Length: 21 cm (approx. 8 ¼"). *T.10.76611. R1654. Stolen from a gallery in London, England in February 2002. Recovered with the help of the ALR in London in August 2014.

19

19. **Unknown Artist** (Italian, 19th century). ***Mercury.*** Bronze. 99 x 102 cm (approx. 39" x 40 ¼"). *L95.1504. R1689. Stolen from a private residence in Surrey, England in December 1988. Recovered with the help of the ALR in London in October 2014.

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58

72

87

90

109

114

STOLEN ART

PAINTINGS

58. GUERCINO (Giovanni Francesco Barbieri) (Italian, 1591-1666). ***The Madonna with Saints John the Evangelist and Gregory the Wonderworker,*** 1639. Oil on canvas. 6' x 10'. Stolen from the Church of San Vincenzo, Modena, Italy on August 10, 2014.

72. NORBERT JOSEPH CARL GRUND (Bohemian, 1717-1767). ***A Gentleman Listening to the Lute Playing of a Lady,*** 1750. Oil on panel. 7.49 x 11.51 cm (approx 3" x 4 ½"). *L14.681. Stolen from a private residence in Munich, Germany on June 6, 2014. See also item nos. 71 and 73.

WORKS ON PAPER

87. MAYNARD DIXON (American, 1875-1946). ***Untitled (Stagecoach Attack).*** Gouache. 16.99 x 11.99 cm (approx. 6 ¾" x 4 ¾"). *L14.505. Stolen from a private residence in Hollister, CA on April 11, 2014.

90. PAVEL TCHELITCHEW (Russian, 1898-1957). ***Four Female Figures under a Tree,*** 1929. Watercolor and ink on paper. 26.49 x 20.5 cm (approx. 10 ½" x 8"). Signed l/r. *L14.731. Stolen from private storage in Moscow, Russia on April 13, 2009.

PHOTOGRAPHS

109. STEVE MCCURRY (American, born 1950). ***Afghan Girl Mosaic,*** 2010. Photographic print. 101.6 x 76.2 cm (40" x 30"). Ed. no. 3/30. Signed and numbered on the verso.

The artist used his iconic cover photo from a 1985 issue of National Geographic to create a mosaic made from thousands of his images. *L14.1095. Stolen from a gallery in Greenwich, CT on September 1, 2014.

SCULPTURE

114. ERNST BARLACH (German, 1870-1938). ***Kussgruppe II,*** 1921. Bronze. 16 x 13 cm (approx. 6" x 5 ¼"). Signed; foundry mark: H. Noack, Berlin. *L14.836. Stolen from a gallery in Berlin, Germany on May 2, 2014.

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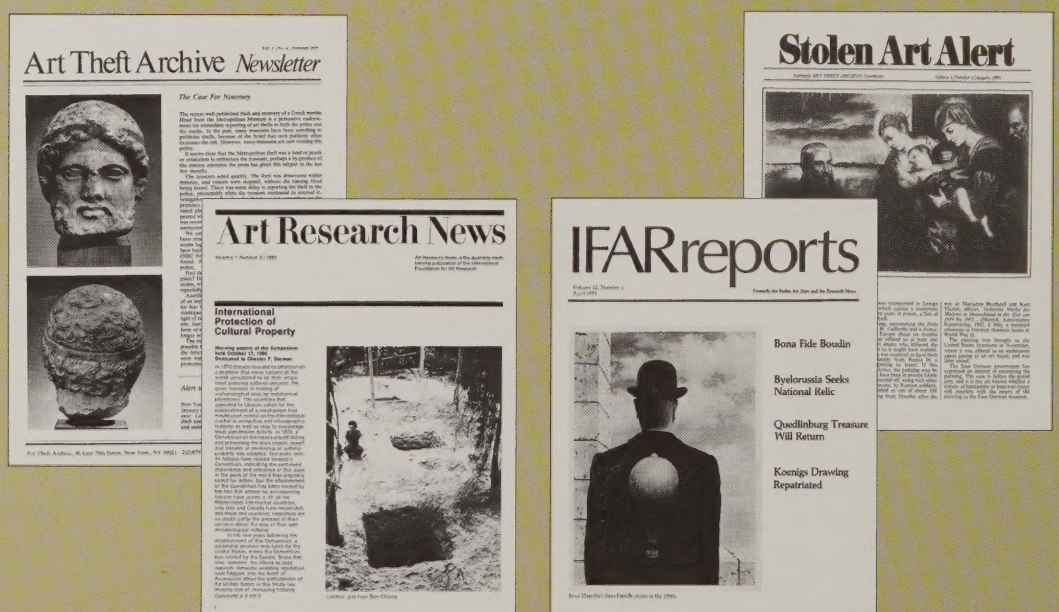
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